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No. (1)

Supreme Court, U.S.
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In the
Supreme Court of the United States

DAVID MAXWELL-JOLLY, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA,

Petitioner,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, A NONPROFIT CORPORATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act, a state that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population." Virtually all of the Circuits to have considered the issue, including the Ninth Circuit, have concluded that this provision may not be enforced by private parties under 42 U.S.C. § 1983, and respondents do not contend otherwise.

The question presented is whether Medicaid recipients and providers may nonetheless maintain a private cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law reducing reimbursement rates.

LIST OF PARTIES

Petitioner is David Maxwell-Jolly, Director of the Department of Health Care Services, State of California, a position that he assumed effective January 1, 2009.

Respondents are Independent Living Center of Southern California, Gray Panthers of Sacramento, Gray Panthers of San Francisco, Gerald Shapiro, Pharm.D (d/b/a Uptown Pharmacy and Gift Shop), Sharon Steen (d/b/a Central Pharmacy), Mark Beckwith, Margaret Dowling, Tran Pharmacy, Inc. (d/b/a Tran Pharmacy), and Jason Young.

Respondent-Intervenors are Sacramento Family Medical Clinics, Inc., Theordore Mazer, M.D., Ronald B. Mead, D.D.S., and Acacia Adult Day Services.[1]

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[1] Respondent-Intervenors did not participate in the briefing in the Ninth Circuit, but first sought to appear in that court on October 1, 2008, approximately two weeks after the Ninth Circuit issued the opinion at issue here. On February 2, 2009, the Ninth Circuit recalled its mandate, entered the appearances of Respondent-Intervenors, and issued a new mandate providing that "[t]he judgment of this Court, entered 9/17/08, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure."

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of California, on behalf of David Maxwell-Jolly, Director, Department of Health Care Services, State of California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 543 F.3d 1050. The opinion of the district court, App., *infra*, 37a, is unreported.

STATEMENT OF JURISDICTION

The decision under review was issued on September 17, 2008. App., *infra*, 2a. Petitioner filed a Petition for Panel Rehearing and Petition for Rehearing En Banc, which the court of appeals denied on November 3, 2008. App., *infra*, 52a. On January 16, 2009, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including April 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Title 42, section 1396a(a)(30)(A) of the Medicaid Act states in pertinent part:

> (a) Contents
>
> A State plan for medical assistance must –
>
> * * *
>
> (30)(A) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and

> services are available to the general population in the geographic area. . .

STATEMENT OF THE CASE

A. The State Statutes at Issue (AB 5)

On January 10, 2008, the Governor of California declared a fiscal emergency and directed the California legislature into a special session. App., *infra*, 59a. In response, on February 15, 2008, the legislature enacted Assembly Bill No. 5 (AB 5). App., *infra*, 54a, 66a. The legislature found "that the state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures to avoid reducing vital government services necessary for the protection of the health, safety, and welfare of the citizens of the State of California." App., *infra*, 64a. AB 5 enacted spending reductions to a variety of benefits programs, including Medi-Cal, the state's implementation of Medicaid. App., *infra*, 60a-66a.

Newly enacted California Welfare and Institutions Code § 14105.19(b)(1) reduced by 10 percent payments under Medi-Cal's fee-for-service program for physicians, dentists, pharmacies, adult day health care centers, clinics, health systems, and other providers. Section 14105.19(b)(3) reduced payments to managed care plans by the actuarial equivalent of 10 percent. Finally, section 14166.245(b) reduced payments to acute care hospitals not under contract with the Department of Health Care Services (DHCS) for

inpatient services by 10 percent. Some services were exempted from the cuts, including services provided by certain acute care hospitals, federally qualified health centers, rural health clinics, hospices, public hospitals, and hospitals under contract with the state. Cal. Welf. & Inst. Code §§ 14105.19(c), 14166.245(d).

The legislature directed DHCS to "promptly seek any necessary federal approvals for the implementation of" the rate reductions. Cal. Welf. & Inst. Code § 14105.19(g); *see also id.*, § 14166.245(f). On September 30, 2008, DHCS submitted a state plan amendment to the Centers for Medicare and Medicaid Services, which remains pending. App., *infra*, 67a-79a.

Respondents and intervenors are Medicaid beneficiaries, service providers, and advocacy groups that seek to enjoin DHCS's implementation of the payment reductions on the ground that they violate 42 U.S.C. § 1396a(a)(30)(A).

B. The Medicaid Act

Medicaid is a cooperative federal-state program that provides federal financial assistance to participating states to reimburse certain costs of medical treatment for the poor, elderly, and disabled. 42 U.S.C. § 1396. A state's participation in Medicaid is voluntary, but if it chooses to participate, it must comply with the Medicaid Act and implementing regulations promulgated by the Secretary of Health and Human Services (HHS). *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). To receive funds, a

state must establish and administer its Medicaid program through a state plan approved by HHS. 42 U.S.C. § 1396a. The receipt of federal funding is expressly conditioned on compliance with the Medicaid Act, and HHS is authorized to withhold funds for noncompliance. 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35.

At issue here is a provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), that establishes some general principles regarding the utilization of, and the payment for, Medicaid care and services. A state plan must

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area. . . .

42 U.S.C. § 1396a(a)(30)(A).

This Court has not previously considered whether § 1396a(a)(30)(A) is privately enforceable. However, in *Wilder*, this Court considered whether a different (now repealed) provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(13)(A) (1982 ed., Supp. V),

known as the Boren Amendment, could be privately enforced under 42 U.S.C. § 1983. The Boren Amendment required states, as part of their state plans, to find and make assurances that payments to hospitals under Medicaid were reasonable and adequate to meet the costs incurred by efficiently and economically operated facilities. *Wilder*, 496 U.S. at 502-03; *see also Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 537 (3d Cir. 2002). In *Wilder*, this Court held that the Boren Amendment created an individual "right," enforceable by providers under § 1983, to "the adoption of reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operated facility." 496 U.S. at 510.

Congress subsequently repealed the Boren Amendment. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507-08 (1997). In so doing, it stated its intent not only to reverse *Wilder*, but to preclude any provider challenges to rates under the Medicaid Act. A House Report noted that under the Boren Amendment, "[a] number of Federal courts have ruled that State systems failed to meet the test of 'reasonableness' and some States have had to increase payments to these providers as a result of these judicial interpretations." H.R. Rep. No. 105-149, at 590 (1997). Therefore, the House Report stated: "It is the Committee's intention that, following enactment of this Act, neither this nor any other provision of [§ 1396a] will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive." *Id.*

at 591. Courts have therefore concluded that "[o]ne of Congress's main objectives – perhaps its dominant objective – in repealing the Boren Amendment was to take away the right to sue under § 1983." *Pa. Pharmacists*, 283 F.3d at 540 n.15 (Alito, J.).

Since the Boren Amendment's repeal, seven courts of appeals have considered whether § 1396a(a)(30)(A) may be enforced by Medicaid providers or beneficiaries under 42 U.S.C. § 1983. The First, Third, Fifth, Sixth, Ninth, and Tenth Circuits have concluded that it does not, a conclusion that respondents do not dispute. *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 56-59 (1st Cir. 2004) (not enforceable by providers); *Pa. Pharmacists*, 283 F.3d at 541-42 (not enforceable by providers); *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 702-03 (5th Cir. 2007) (not enforceable by beneficiaries of services or providers), *cert. denied*, 129 S. Ct. 34 (2008); *Westside Mothers v. Olszewski*, 454 F.3d 532, 541-43 (6th Cir. 2006) (not enforceable by recipients of services); *Sanchez v. Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005) (not enforceable by providers or recipients of services); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1146-48 (10th Cir. 2006) (not enforceable by providers or recipients of services), *cert. denied*, 549 U.S. 1305 (2007). The Eighth Circuit alone has reached a contrary result. *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1005, 1013-16 (8th Cir. 2006) (enforceable by providers and recipients of services), *cert. granted,*

judgment vacated in part, 127 S. Ct. 3000 (2007) (mem.).

C. District Court Proceedings

Respondents filed their lawsuit on April 22, 2008, in Los Angeles superior court. App., *infra*, 37a. DHCS removed the case to federal court. App., *infra*, 39a. In May 2008, respondents filed the operative first amended complaint and a motion for preliminary injunction. App., *infra*, 39a. They contended that the 10 percent payment reductions violate § 1396a(a)(30)(A) because, they claimed, the California legislature failed to consider the factors set forth within the federal statute when it enacted the payment reductions, and because the cuts could result in insufficient providers to provide care to Medi-Cal recipients. App., *infra*, 42a.

The district court denied respondents' motion for preliminary injunction. App., *infra*, 51a. The court observed that, in *Sanchez v. Johnson*, the Ninth Circuit held that § 1396a(a)(30)(A) did not confer individually enforceable rights. App., *infra*, 43a-46a. It concluded that respondents could not use a preemption claim under the Supremacy Clause to effectuate an end run around *Sanchez*. App., *infra*, 46a, 50a-51a. Accordingly, the court found that respondents had no likelihood of success on the merits and denied their motion. App., *infra*, 50a.

D. Ninth Circuit's Decision

The Ninth Circuit reversed the district court. As framed by the Ninth Circuit, the question presented on appeal was "whether the Supremacy Clause provides a valid cause of action to seek injunctive relief on the basis of federal preemption." App., *infra*, 16a. Ultimately, the Ninth Circuit held in the affirmative: that private parties "maintain[] a valid cause of action under the Supremacy Clause to assert . . . a claim for injunctive relief" where they claim that state legislation allegedly is preempted by federal law. App., *infra*, 36a.

The Ninth Circuit relied on a number of cases from this Court, including *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), in which this Court permitted preemption claims to proceed without analyzing whether the federal statutes at issue created privately enforceable rights. App., *infra*, 11a-15a. The Ninth Circuit characterized *Shaw* as "reaffirm[ing] the general rule that a plaintiff seeking to enjoin state law based on federal preemption maintains a valid federal cause of action." App., *infra*, 14a. In support, the Ninth Circuit quoted language from a footnote in *Shaw* that only addressed the jurisdictional basis for such suits. App., *infra*, 14a (quoting *Shaw*, 463 U.S. at 96 n.14) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.").

The Ninth Circuit considered and rejected DHCS's suggestion that the analysis might be different as to

federal Spending Clause statutes because it believed that this Court already had rejected such an argument in *Pharmaceutical Research and Manufacturers of America (PhRMA) v. Walsh*, 538 U.S. 644 (2003):

> The Director provides little, if any, justification for treating a claim of preemption under a federal statute passed pursuant to Congress's spending power differently from a claim of preemption under any of the federal statutes discussed above. But even if she had, this argument has also been flatly rejected by the Supreme Court and other circuits that have addressed the question.

App., *infra*, 20a. According to the Ninth Circuit, in *Walsh*, this Court "implicitly" assumed that "a private party seeking to enjoin implementation of a state law allegedly preempted by the federal Medicaid Act may bring suit for injunctive relief directly under the Supremacy Clause." App., *infra*, 24a. The court cited in support the fact that seven justices of this Court reached the merits of PhRMA's claim without addressing whether plaintiff had stated a valid claim for relief. App., *infra*, 23a. The Ninth Circuit also found "persuasive" recent decisions from the D.C. and Fifth Circuits that similarly construed *Walsh* as authorizing preemption challenges based on Spending Clause statutes that do not themselves create privately enforceable rights. App., *infra*, 24a-26a (citing *PhRMA v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004) and *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005)).

REASONS FOR GRANTING THE PETITION

If it remains unreviewed, the Ninth Circuit's decision will negate the limitations on private enforcement of federal statutes that this Court has carefully crafted and applied over several decades. *See, e.g., Cort v. Ash*, 422 U.S. 66 (1975); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). Under the reasoning adopted by the Ninth Circuit, a "valid cause of action" exists to enforce a federal statute and enjoin state conduct *any time* a private party alleges a conflict between state and federal law. Thus, the Ninth Circuit concluded that the private parties here could state a claim under the Supremacy Clause based solely on their allegation of a federal-state conflict, even though § 1396a(a)(30)(A) is not privately enforceable under § 1983; even though the Ninth Circuit and other appellate courts have found § 1396a(a)(30)(A) to be "ill-suited" to judicial enforcement; even though HHS has not yet determined if there really is a conflict; and despite evidence that Congress does not want any provision of § 1396a to be privately enforced. *See Sanchez*, 416 F.3d at 1060; *Pa. Pharmacists*, 283 F.3d at 540 & n.15. If it stands, the Ninth Circuit's decision will result in a massive expansion in the states' liability under the Medicaid Act and potentially other Spending Clause statutes, and will render a nullity entire lines of cases that previously limited the circumstances in which private parties may sue a state.

The need for Court review is compelling because several courts of appeals – including the D.C., First, Second, Fifth, Eighth, Ninth, Tenth, and Federal Circuits – have now erroneously concluded that this Court already has resolved the question presented here. In permitting preemption claims to proceed based on Spending Clause legislation that is otherwise unenforceable under § 1983, several of these courts have relied on this Court's decision in *PhRMA v. Walsh*, which they believed (incorrectly) foreclosed arguments to the contrary. *Walsh* did not, however, address whether petitioner there had stated a valid cause of action under the Medicaid provision at issue, but simply rejected its claim on the merits. The courts of appeals' conclusions that this Court *implicitly* reached the validity of plaintiff's cause of action, which they saw as "jurisdictional," was clear error under this Court's precedent – error that only this Court may correct. *See Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002).

The issues in this lawsuit are important and recurring. The federalism concerns are especially substantial because of the Spending Clause context. A state's voluntary participation in Medicaid effectuates a contractual relationship between that state and the federal government. Congress itself has specified the remedy that applies when a state breaches the agreement and then fails to cure its breach on proper notice: HHS may withhold federal money. To allow private parties to sue to compel, in

effect, a different contract remedy – a state's specific performance – is to disrespect the voluntary nature of the state's continuing participation in a "cooperative" program. Because so many state decisions are premised on funds received under exactly this type of arrangement with the federal government, the states' liability under the type of lawsuit sanctioned here would be virtually unlimited.

I.

THE NINTH CIRCUIT'S DECISION UNDERMINES THIS COURT'S DECISIONS LIMITING WHEN FEDERAL STATUTES MAY BE ENFORCED IN § 1983 ACTIONS OR THROUGH IMPLIED CAUSES OF ACTION

The Ninth Circuit adopted an expansive theory of state liability that, if unaddressed, will nullify over 30 years of decisions from this Court establishing limitations on private suits against the states. Under the Ninth Circuit's theory, to state a valid cause of action for injunctive relief, all a plaintiff need do is allege the existence of a conflict between a state statute (here, AB 5) and a federal law (here, § 1396a(a)(30)(A)). Such an exceptionally broad-brush approach cannot be reconciled with the limitations on private suits that this Court has recognized in two separate lines of cases: *Cort v. Ash* and its progeny; and *Pennhurst State School and Hospital v. Halderman* and its progeny, including *Gonzaga University v. Doe*.

1. In the *Cort* and *Pennhurst-Gonzaga* lines of cases, this Court has repeatedly addressed and effectively resolved a difficult problem: when to permit private enforcement of a federal statute enacted by Congress when Congress itself has declined expressly to authorize private lawsuits. Although there are analytical differences, in *both* contexts this Court has explained that there must be clear and unambiguous evidence that Congress intended for the federal provision at issue to be privately enforceable before a private suit may be implied or recognized. *See Gonzaga*, 536 U.S. at 283 ("[T]he inquiries overlap in one meaningful respect – in either case we must first determine whether Congress *intended to create a [privately enforceable] federal right*."). This is because Congress, as the authority that enacts federal statutes, has the prerogative to determine when and how they may be privately enforced. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *see also Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008).

Thus, in *Cort v. Ash*, this Court recognized four significant limitations on when a private cause of action may be implied directly under a federal statute. The relevant considerations are: (1) "does the statute create a federal right in favor of the plaintiff"; (2) "is there any indication of legislative intent, explicit or implicit, either to create such a remedy or

to deny one"; (3) "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff"; and (4) "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78. Since its decision in *Cort*, this Court has focused on the overarching importance of the second factor, requiring clear evidence of Congressional intent to create both a private right and a private remedy. *See, e.g.*, *Sandoval*, 532 U.S. at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."); *Transamerica Mortg. Advisors Inc. v. Lewis*, 444 U.S. 11, 24 (1979) ("The dispositive question remains whether Congress intended to create any such remedy."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

The Court has also adopted significant limitations on when a private suit may be brought under § 1983. Here, specifically with respect to Spending Clause legislation such as the Medicaid Act, this Court has held that, "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement." *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst*, 451 US. at 17, 28 & n.21). Thus, a "'plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would

strain judicial competence,'" and the provision "'must be couched in mandatory, rather than precatory, terms.'" *Id.* at 282 (quoting *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)). "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286.

These limitations are especially important as to Spending Clause legislation such as the Medicaid Act. Here, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst,* 451 U.S. at 28; *see also Gonzaga,* 536 U.S. at 280; *Walsh*, 538 U.S. at 675 (Scalia, J., concurring in judgment) ("I would reject petitioner's statutory claim on the ground that the remedy for the State's failure to comply with the obligations it has agreed to undertake under the Medicaid Act . . . is set forth in the Act itself: termination of funding by the Secretary of the Department of Health and Human Services." (citations omitted)); 538 U.S. at 681-82 (Thomas, J., concurring in judgment).

2. The theory adopted by the Ninth Circuit would undermine the *Cort* and *Pennhurst-Gonzaga* lines of cases by authorizing a Supremacy Clause-based cause of action that does not require consideration of Congressional intent, judicial enforceability, or any of the other factors previously considered so important by this Court. The potential impact of such

a theory is dramatically demonstrated by its application in the present case, where it was utilized by the Ninth Circuit to revive a type of claim that heretofore was precluded by this Court's and the Ninth Circuit's own precedents.

Respondents do not dispute that the provision at issue here, § 1396a(a)(30)(A), may not be privately enforced under any of the traditional theories of state liability previously recognized by this Court. That is, respondents may not sue directly under § 1396a(a)(30)(A) because no implied right of action exists under the Social Security Act, of which Medicaid is a part. *Maine v. Thiboutot*, 448 U.S. 1, 6 (1980); *Edelman v. Jordan*, 415 U.S. 651, 674 (1974).

In addition, private enforcement of § 1396a(a)(30)(A) is unavailable under § 1983 because, as the Ninth and five other circuits have held (and respondents do not dispute), § 1396a(a)(30)(A) does not create any privately enforceable rights. *See, e.g., Sanchez*, 416 F.3d at 1059 ("[T]he flexible, administrative standards embodied in the statute do not reflect a Congressional intent to provide a private remedy for their violation."); *see also Long Term Care Pharmacy Alliance*, 362 F.3d at 58 (concluding, based on structure and text of § 1396a(a)(30)(A), that "plan review by the Secretary is the central means of enforcement intended by Congress"). To the contrary, through its repeal of the Boren Amendment, Congress indicated its intention to preclude private suits under § 1396a. *Pa. Pharmacists*, 283 F.3d at 540 n.15; H.R. Rep. No. 105-149, *supra*, at 590. Moreover, as the Ninth

Circuit itself explained in *Sanchez*: "[t]he language of § 30(A) is . . . ill-suited to judicial remedy; the interpretation and balancing of the statute's indeterminate and competing goals would involve making policy decisions for which this court has little expertise and even less authority." 416 F.3d at 1060. In this respect, § 1396a(a)(30)(A) contrasts significantly from the Boren Amendment that this Court considered in *Wilder*. *See Pa. Pharmacists*, 283 F.3d at 538 (Alito, J.) (contrasting § 1396a(a)(30)(A) and the Boren Amendment).

Dressing the lawsuit up as a preemption challenge should not change the conclusion that the statute is not privately enforceable. This Court's preemption cases make clear that, here too, congressional intent is relevant and potentially dispositive. *See Wyeth v. Levine*, No. 06-1249, ___ U.S. ___, 2009 WL 529172, at *5 (March 04, 2009) (congressional intent is the "ultimate touchstone in every preemption case"). It is entirely illogical to consider evidence of congressional intent before permitting a cause of action to be implied directly under the statute itself (or to authorize suit under § 1983), but to ignore such evidence in a preemption case – indeed, to authorize a "valid cause of action" despite evidence that Congress intended to preclude private suits. Further, adopting a theory under which private preemption claims may proceed under the Supremacy Clause as to purported conflicts with *any and all* federal statutes, independent of congressional intent, would negate the principle that "private rights of

action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286.

In addition, the same concerns about judicial enforcement that the courts have identified with respect to § 1396a(a)(30)(A) in the § 1983 cases also apply here. State compliance with such policy-laden objectives is appropriately reviewed by HHS, the federal agency charged with enforcing the Medicaid Act, rather than the courts acting at the request of private parties. Indeed, implying a private cause of action in this case would effectuate a judicial usurpation of HHS's obligation to review California's pending state plan amendment. *See Walsh*, 538 U.S. at 661 (Secretary of HHS's determinations with respect to proposed state plan amendments under the Medicaid Act are "presumptively valid"). The principle of deference to agency decisions is substantially undermined if a court can determine on its own, in a private suit brought preemptively before HHS has acted, whether a state's proposed plan amendment complies with the Medicaid Act. The Court can avoid separation-of-powers problems by limiting judicial involvement to that expressly contemplated by the Medicaid Act itself – i.e., review of the Secretary's decision. *See Walsh*, 538 U.S. at 675 (Scalia, J., concurring in judgment).

Finally, this Court already has twice rejected efforts to convert what are, fundamentally, statutory claims into constitutional claims via the Supremacy Clause. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (agreeing that "the

Supremacy Clause, of its own force, does not create rights enforceable under § 1983"); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979) (holding that "an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of § 1343"). Indeed, the Court has contrasted the Supremacy Clause, which cannot of its own force create a right of action, with the Commerce Clause, which can. *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) ("By contrast, the Commerce Clause of its own force imposes limitations on state regulation of commerce and is the source of a right of action in those injured by regulations that exceed such limitations.").

This Court should act to ensure that its decisions in cases such as *Cort*, *Pennhurst*, *Blessing*, *Sandoval*, and *Gonzaga*, and the plethora of lower court decisions issued in reliance on this Court's precedent, are not effectively nullified.[2] This Court has developed a

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[2] The courts have held that various spending statutes do not create "rights" and therefore are not privately enforceable under § 1983. *See, e.g., Gonzaga*, 536 U.S. 273 (Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g); *Blessing*, 520 U.S. 329 (Child Support Enforcement Act, 42 U.S.C. §§ 651-669b); *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199 (3d Cir. 2008) (No Child Left Behind Act, 20 U.S.C. §§ 6311(h)(6), 6316(b)(6)); *Arrington v. Helms*, 438 F.3d 1336 (11th Cir. 2006) (Temporary Assistance to Needy Families Act, 42 U.S.C. § 657(a)); *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003) (Adoption Assistance and Child Welfare Act, 42 U.S.C. § 675(5)(D), (E)); *Grammar v. John J. Kane Reg'l*

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sensible and workable scheme for determining when a private cause of action may be implied in the absence of express congressional authorization. That scheme will be rendered meaningless if, as the Ninth Circuit has held (along with the D.C., First, Fifth, and Eighth Circuits, *see infra* Part II), a cause of action for injunctive relief lies any time there is an alleged conflict between a state and a federal statute.

II.

RECENT CIRCUIT COURT DECISIONS HAVE MISREAD THIS COURT'S PRECEDENT AND CREATED A SPLIT WITH THE ELEVENTH CIRCUIT REGARDING THE AVAILABILITY OF PRIVATE PREEMPTION LAWSUITS BASED ON FEDERAL STATUTES THAT ARE NOT OTHERWISE PRIVATELY ENFORCEABLE

There is a compelling need for this Court's review because of confusion and conflict among the courts of appeal regarding the viability of private suits like the present one, which only this Court can resolve. In addition to the Ninth Circuit, the D.C., First, Fifth, and Eighth Circuits also have recently authorized

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Ctrs.-Glen Hazel, No. 06-781, 2007 WL 1087751 (W.D. Pa., Apr. 6, 2007) (Federal Nursing Home Reform Act, 42 U.S.C. §§ 1395i-3 & 1396r); *Williams v. U.S. Dep't of Hous. & Urban Dev.*, No. 04-CV-3488, 2006 WL 2546536 (E.D.N.Y. Sept. 1, 2006) (Housing & Urban Development Act, 12 U.S.C. § 1701u); *Almendares v. Palmer*, No. 3:00-CV-7524, 2002 WL 31730963 (N.D. Ohio Dec. 3, 2002) (Food Stamp Act, 7 U.S.C. § 2020(e)(1)(B)).

such lawsuits, based largely on a misperception that this Court already resolved the issue presented here in *PhRMA v. Walsh*. Further, the Ninth Circuit's decision has deepened a circuit split with the Eleventh Circuit, which has rejected precisely the implied cause of action theory adopted here. *See Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 643-44 (11th Cir. 1990).

1. The Ninth Circuit's decision is the latest in a series of court of appeals decisions to permit preemption suits to go forward based on spending legislation that is not privately enforceable under § 1983. These decisions stem in large part from confusion over the scope of this Court's decision in *Walsh*.

On review in *Walsh* was the First Circuit's decision in *PhRMA v. Concannon*, 249 F.3d 66 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003). In *Concannon*, the First Circuit rejected, on the merits, a Medicaid Act-based preemption challenge to Maine's Act to Establish Fairer Pricing for Prescription Drugs. Under the Act, drug manufacturers were required to enter into agreements with the state, similar to those used in the state's Medicaid program, to provide rebates for non-Medicaid customers, or else have their drugs subject to a prior-authorization requirement in Medicaid. *Id.* at 71-72. Plaintiff contended that the program conflicted with the Medicaid Act, specifically 42 U.S.C. §§ 1396a, 1396a(a)(19), 1396r-8(d)(1)(A), and 1396r-8(d)(5)(A), (B). *See id.* at 76-79. The First Circuit reached the merits of the case only after explaining that "'a state or territorial law can be

unenforceable as preempted by federal law *even when the federal law secures no individual substantive rights* for the party arguing preemption.'" 249 F.3d at 73 (emphasis added, quoting *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000)). Accordingly, the court rejected Maine's argument that plaintiff lacked "prudential standing" to bring its challenge, and proceeded to an analysis of the merits of plaintiff's lawsuit.

This Court affirmed the First Circuit's decision in *Walsh*. However, the plurality opinion did so without considering whether the underlying Medicaid statutes created any privately enforceable rights or whether Congress intended to create a private remedy in the federal courts for violations of the statutes at issue. Instead, this Court held, as had the First Circuit, that on the merits, Maine's Act did not conflict with the Medicaid Act. 538 U.S. at 662-68. As alluded to earlier, two justices of this Court wrote separately to suggest that plaintiff may not have stated a valid cause of action, and a third to suggest that the district court should have respected the primary jurisdiction of HHS. *Id.* at 675 (Scalia, J., concurring in judgment); *id.* at 675-83 (Thomas, J., concurring in judgment); *id.* at 672-73 (Breyer, J., concurring in part, and concurring in judgment).

The D.C. Circuit subsequently interpreted *Walsh* as having implicitly held that plaintiff had stated a valid preemption cause of action under the Medicaid Act. In *PhRMA v. Thompson*, 362 F.3d 817 (D.C. Cir.

2004), the court rejected a preemption challenge to a different state's drug rebate program, the Michigan Best Practices Initiative, again on the merits. Significantly, the court rejected the state's argument that there could be no preemption lawsuit because the Medicaid provisions at issue did not support a private right of action. 362 F.3d at 819 n.3 (explaining that defendant argued that there was "no private right of action for injunctive relief against the state based on Justices Scalia's and Thomas's separate opinions in *PhRMA v. Walsh*."). The court held that, "[b]y addressing the merits of the parties' arguments without mention of any jurisdictional flaw, the remaining seven Justices [in *PhRMA v. Walsh*] appear to have *sub silentio* found no flaw." *Id.*

The D.C. Circuit erred to the extent that it interpreted this Court's willingness to review the merits of the preemption challenge in *Walsh* as containing an implicit holding that a valid cause of action existed. This Court has repeatedly emphasized that the absence of a valid cause of action is not a jurisdictional flaw. *See, e.g., Verizon*, 535 U.S. at 642-43 ("'[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case.'" (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998))); *Bell v. Hood*, 327 U.S. 678, 682 (1946). Accordingly, this Court has often been willing to assume – without deciding – that a valid cause of

action existed in order to proceed to an analysis of the merits of plaintiffs' claims.

Thus, in *Owasso Independent School District v. Falvo*, 534 U.S. 426, 431 (2002), this Court "assume[d], but without so deciding or expressing an opinion on the question, that private parties may sue an educational agency under § 1983 to enforce" the Family Educational Rights and Privacy Act (FERPA), in order to proceed to the merits of the case. Yet, in a separate case decided that very same term, the Court held that no such right exists under FERPA. *Gonzaga,* 536 U.S. 273; *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005) (assuming for the purpose of the case, based on parties' concessions, that Telecommunications Act created rights enforceable under 42 U.S.C. § 1983).[3]

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[3] There are two additional reasons why this Court did not implicitly rule that petitioner had stated a valid cause of action in *Walsh*. First, Maine did not specifically argue that petitioner lacked a private right of action, but only that it lacked prudential standing. Indeed, Justice Thomas, in his opinion concurring in judgment, stated that "careful consideration" should be given "to whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action" through a preemption lawsuit, but that the Court could not reach the issue because "Respondents have not advanced this argument in this case." *Walsh*, 538 U.S. at 683 (Thomas, J., concurring in judgment). Second, as petitioner argued in its reply brief on the merits in this Court, Maine was foreclosed from pressing its contention in this Court because the state did not file a cross-petition on that issue. Reply Brief of Petitioner at 1 n.1, *PhRMA v. Walsh*, 538 U.S. 644 (2002) (No. 01-88).

The Fifth Circuit also (mis)relied on this Court's decision in *Walsh* to authorize a preemption challenge based on a federal spending statute that did not create any "rights" enforceable by plaintiffs. In *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324 (5th Cir. 2005), family planning and abortion services providers challenged a Texas funding restriction on the ground that it "violate[d] the Supremacy Clause . . . by imposing additional eligibility requirements on Appellees' receipt of federal funds that are inconsistent with the federal funding statutes," including Title X of the Public Health Service Act and Title XX of the Social Security Act. 403 F.3d at 328 (footnote omitted). Citing this Court's decision in *Shaw v. Delta Air Lines, Inc.*, the court of appeals held that the district court had "jurisdiction," under 28 U.S.C. § 1331, over a "preemption claim seeking injunctive and declaratory relief." *Id.* at 331. The court then rejected the state's argument that, "even with federal jurisdiction over the claim, it was improper for the district court to resolve it because Appellees were not seeking to vindicate any right or to enforce any duty running to them." *Id.* Citing this Court's decision in *Walsh*, the court asserted that "seven Justices [there] assumed both that the federal courts have jurisdiction and that a claim was stated for Spending Clause preemption, tacitly rejecting the suggestion advanced by two concurring Justices – and today espoused by [defendant] – that no claim was stated." *Id.* at 332. The court also cited, with approval, authorities suggesting that the Supremacy Clause may be the source of an

implied right of action to enjoin state or local regulations that are federally preempted. *Id.* at 334 n.47.

Based on similar reasoning, the Eighth Circuit has also recently held that a preemption claim may proceed under the Medicaid Act even if the provision at issue does not create any privately enforceable rights. In *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006), disabled Medicaid recipients sought to challenge a Missouri Medicaid regulation that curtailed provision of durable medical equipment to most categorically-needy Medicaid recipients on the ground that it conflicted with, *inter alia*, the "reasonable-standards" requirement of federal Medicaid Act, 42 U.S.C. § 1396a(a)(17). The court of appeals held that § 1396a(a)(17) does not create an "individual right," and that its language is "'too vague and amorphous for judicial enforcement.'" 451 F.3d at 509. And, the court recognized that the Supremacy Clause "is not the direct source of any federal right, but 'secures federal rights by according them priority whenever they come in conflict with state law.'" *Id.* (quoting *Golden State Transit*, 496 U.S. at 107). Nonetheless, the court allowed plaintiff's claim to proceed because "[p]reemption claims are analyzed under a different test than section 1983 claims, affording plaintiffs an alternative theory for relief when a state law conflicts with a federal statute or regulation." *Id.*

The remaining circuits have not addressed whether a Spending Clause statute that does not create any privately enforceable rights may nonetheless be the basis for a preemption claim under the

Supremacy Clause. However, the Federal,[4] Second,[5] and Tenth[6] Circuits appear to accept that, at least with respect to other sorts of federal claims, the Supremacy Clause may create a preemption cause of action independently of whether the underlying federal statute creates privately enforceable rights.

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[4] *See Biotechnology Indus. Org. v. District of Columbia*, 496 F.3d 1362, 1368 (Fed. Cir. 2007) (holding that court had jurisdiction over preemption challenge to District of Columbia's Prescription Drug Excessive Pricing Act; "though the plaintiffs' claim is created by principles of supremacy law, its resolution necessarily requires us to construe the patent statutes").

[5] *See W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222 (2d Cir. 1987) (holding that airline could bring Supremacy Clause challenge to local aviation regulation as preempted by federal statute, 49 U.S.C. § 1305(a)(1), even though no private right of action could be implied directly under the statute); *Burgio & Campofelice, Inc. v. N.Y.S. Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997) (citing 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3566, at 102 (1984)).

[6] *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) ("A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action."); *Joseph A. ex rel. Corrine Wolf v. Ingram*, 275 F.3d 1253, 1265 (10th Cir. 2002) (explaining, in rejecting Eleventh Amendment defense, that plaintiffs "are not trying to create a private right of action against the Department under the Social Security Act," but rather were pursuing "an implied cause of action" under *Ex parte Young*, 209 U.S. 123 (1908) and the Supremacy Clause); *see also Day v. Bond*, 511 F.3d 1030, 1033-34 (10th Cir. 2007) (citing *Qwest*, 380 F.3d 1258, with approval and harmonizing decision with *Planned Parenthood*, 403 F.3d 324), *cert. denied*, 128 S. Ct. 2987 (2008).

2. The Ninth Circuit's decision, together with those from the D.C., First, Second, Fifth, Eighth, Tenth, and Federal Circuits, conflicts with the Eleventh Circuit's decision in *Legal Environmental Assistance Foundation v. Pegues*. In *Pegues*, the Eleventh Circuit rejected the contention that a "cause of action . . . may be implied from the Supremacy Clause" as to a federal statute that is not itself a source of privately enforceable rights. 904 F.2d at 642.

In *Pegues*, an environmental group sued a state entity that issued national pollution discharge elimination system permits that purportedly did not comply with the Federal Water Pollution Control Act. Although the Act at issue expressly authorized certain private party suits (e.g., a citizen suit against an alleged polluter for violating the Act), it did not expressly authorize the type of suit at issue. The court of appeals observed that this Court had previously concluded that no additional private causes of action could be implied directly under the Act:

> In *Middlesex County Sewerage Authority v. National Sea Clammers Association* [453 U.S. 1 (1981)], the Supreme Court reviewed the "unusually elaborate" enforcement and review provisions of the Act, and held that "both the structure of the Act[ ] and [its] legislative history lead us to conclude that Congress intended that private remedies in addition to those expressly provided should not be implied."

904 F.2d at 643 (footnotes omitted). Consequently, the court said that plaintiff was "[s]eeking to sidestep the holding of *Sea Clammers*" by arguing that "a constitutional cause of action should be implied directly from the Supremacy Clause." *Id.*

The court refused to permit plaintiff to "sidestep" *Sea Clammers*, and affirmed dismissal of plaintiff's case because "the Supremacy Clause does not grant an implied cause of action for the relief sought." 904 F.2d at 641. The court recognized that some authorities, including Wright and Miller's *Federal Practice and Procedure*, have suggested that the Supremacy Clause creates an implied right of action for injunctive relief:

> A leading treatise has concluded that "[t]he best explanation of *Ex Parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officials who are threatening to violate the federal Constitution or laws." . . . In addition, [plaintiff] cites dicta in footnotes from *Shaw v. Delta Air Lines* . . . and *Franchise Tax Board v. Construction Laborers Vacation Trust*, . . . which suggest that a federal cause of action might be implied to permit a declaratory adjudication that federal law pre-empts a contrary state law, even if the federal statute does not expressly provide a cause of action.

Id. at 643 (footnotes omitted). However, the court explained that "[t]hese expressions . . . do no more than indicate that the Supremacy Clause provides

federal jurisdiction . . . for a cause of action implied from the statute." *Id.* (citing 28 U.S.C. § 1331) (footnote omitted).[7] The court's reasoning and holding flatly contradicts that of the D.C., First, Second, Fifth, Eighth, Ninth, Tenth, and Federal Circuits.

III.

THE NINTH CIRCUIT WRONGLY DECIDED A RECURRING AND IMPORTANT ISSUE

The question presented in this lawsuit is both important and recurring. The rule adopted by the Ninth Circuit implicates important principles of federalism, and could, if left unaddressed, radically change the means by which alleged conflicts between state and federal laws are resolved when they arise, by shifting some of the burden of resolving such issues from federal agencies to federal courts. The federalism concerns are especially sensitive in this case because of its Spending Clause context. The Medicaid Act creates, in effect, a contractual relationship between the states and the federal government

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[7] The Eleventh Circuit has continued to insist that plaintiffs demonstrate congressional intent to create a private right of action before a preemption claim may proceed. *See, e.g., Bellsouth Telecomm. v. Town of Palm Beach*, 252 F.3d 1169, 1189-92 (11th Cir. 2001) (holding that telecommunications companies could bring preemption claim only after determining, based on analysis of Congressional intent, that the "Act creates a private right of action" for private parties seeking preemption of a state or local statute, ordinance, or regulation).

in which the agreement itself provides the remedies for noncompliance (i.e., potential loss of federal funding). *See* 42 U.S.C. § 1396c; *Gonzaga*, 536 U.S. at 280; *Pennhurst*, 451 U.S. at 11-12, 28; *see also Wilder,* 496 U.S. at 527 (Rehnquist, C.J., O'Connor, J., Scalia, J. & Kennedy, J., dissenting). To allow private parties to sue to, in effect, compel a state's specific performance – a contract remedy that Congress did not itself provide – is to eviscerate the voluntary nature of the underlying agreement in derogation of the state's sovereign right to choose not to comply.

As discussed in Part I, this Court's precedents make clear that Congress's intent is key in determining whether and how a federal statute may be privately enforced. Consistent with this precedent, a private preemption claim should not be authorized where there is no evidence that Congress intended such private enforcement and instead only provided an administrative remedy.

Here, the Ninth Circuit erred by ignoring these principles, and by instead relying on other decisions from this Court for propositions that this Court did not actually reach. The Ninth Circuit – like the D.C. Circuit and Fifth before it – misread this Court's decision in *PhRMA v. Walsh*. It erred when it concluded that this Court's willingness to reach the merits of petitioners' preemption claim carried an implicit determination that petitioner had stated a valid, as opposed to merely arguable, cause of action upon which relief may be granted. *See supra* Part II(1) (citing *Verizon*, 535 U.S. at 642, and other

authorities); *cf. Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.").

The Ninth Circuit also misread the scope of this Court's decision in *Shaw v. Delta Air Lines* and its progeny. In *Shaw*, this Court stated that the courts have "jurisdiction" over lawsuits to "enjoin state officials from interfering with federal rights," and did not reach the separate issue of whether such claims always state a "valid cause of action." *See* 463 U.S. at 96 n.14. This Court explained:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U.S. 123, 160-162 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Id. This Court has reiterated the limited, purely jurisdictional nature of this language in subsequent cases. *Verizon*, 535 U.S. at 642 (citing and quoting *Shaw* for proposition that claim that local regulation is preempted "'presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve'"); *Lawrence County v. Lead-Deadwood*

School Dist. No. 40-1, 469 U.S. 256, 259 n.6 (1985) (similar); *see also Pegues*, 904 F.2d at 643.[8]

The Ninth Circuit appears to have recognized the limited jurisdictional nature of this language from *Shaw*, but again assumed that this Court must have implicitly determined that there always is a valid cause of action to enjoin state action from the Court's willingness to reach the merits of plaintiffs' preemption claims in *Shaw* and its progeny. App., *infra*, 11a, 13a. In this respect, the court made the same error that it made with respect to this Court's decision in *Walsh*.

Nor could the Ninth Circuit properly rely upon *Ex parte Young* for the expansive theory of state liability that it adopted. This Court did not purport to create, in *Ex parte Young*, a new, stand-alone private cause of action to enforce federal statutes, but only eliminated a jurisdictional defense: it described an "exception" to the states' immunity under the Eleventh Amendment. *See Pennhurst*, 465 U.S. at 102. Thus, a section 1983 action against a state official in his or her official capacity that seeks purely injunctive relief may be brought under the *Ex parte Young* exception. But to go further, and construe *Ex parte*

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[8] Thus, the Ninth Circuit's belief that *Verizon* and *Lawrence* "reaffirmed" that a plaintiff asserting preemption under the Supremacy Clause necessarily states a valid cause of action, *see* App., *infra*, 15a, also was incorrect as the cited portions of the decisions only referenced jurisdiction. *Verizon*, 535 U.S. at 642; *Lawrence*, 469 U.S. at 259 n.6.

Young as the source of a private right of action to enforce federal statutes against state officials, would vitiate any and all limitations on private rights of action under federal statutes.

The issues presented here are likely to recur. Hundreds of billions of dollars are distributed to the states each year for cooperative federal-state programs such as Medicaid, the Temporary Assistance to Needy Families Act, No Child Left Behind Act, Food Stamp Act, FERPA, and Adoption Assistance and Child Welfare Act. *See* Office of Mgmt. & Budget, *A New Era of Responsibility: Renewing America's Promise*, Table S-4 (2009) (proposed budget would provide, *inter alia*, $695 billion for Social Security, $453 billion for Medicare, $290 billion for Medicaid, and $571 billion for other programs in FY 2010) *available at* http://www.whitehouse.gov/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf); *see also supra* n.2. These funds become the basis for an uncountable number of program decisions at the state level. If any program decision that allegedly is inconsistent with a federal statute may be the basis for a federal lawsuit – regardless of Congressional intent, and regardless of whether a federal "right" is involved – then the states' liability under such programs will be completely unbounded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., a nonprofit corporation; GRAY PANTHERS OF SACRAMENTO, a nonprofit corporation; GRAY PANTHERS OF SAN FRANCISCO, a nonprofit corporation; GERALD SHAPIRO, PHARM. D. doing business as UPTOWN PHARMACY AND GIFT SHOPPE; SHARON STEEN doing business as Central Pharmacy; MARK BECKWITH; MARGARET DOWLING; TRAN PHARMACY, INC., doing business as TRAN PHARMACY; JASON YOUNG,

Petitioners-Appellants,

v.

SANDRA SHEWRY, Director of the Department of Health Care Services, State of California,

Respondent-Appellee.

No. 08-56061

D.C. No. 2:08-cv-03315-CAS-MAN

OPINION

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted
July 11, 2008 – Pasadena, California

Filed September 17, 2008

Before: Stephen Reinhardt, Marsha S. Berzon, and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Berzon

COUNSEL

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OPINION

BERZON, Circuit Judge:

Petitioner-appellants, a group of pharmacies, health care providers, senior citizens' groups, and Medi-Cal beneficiaries (collectively "ILC"),[1] seek to

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[1] Petitioner-appellants include the Independent Living Center of Southern California, a non-profit corporation providing services

(Continued on following page)

enjoin a state official from implementing legislation reducing payments to medical service providers under the state's Medicaid program, known as "Medi-Cal," by ten percent. ILC alleged in its complaint that the state legislation violates certain provisions of the federal Medicaid Act, and is therefore preempted under the Supremacy Clause.[2] Although ILC sought preliminary relief, the district court denied any such relief, holding that ILC could not allege any viable claim for injunctive relief because none of the

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to over 8,000 disabled individuals annually; Gray Panthers of Sacramento and San Francisco, senior citizens' advocacy groups whose members include a number of Medi-Cal recipients; Gerald Shapiro, a licensed registered pharmacist operating Uptown Pharmacy & Gift Shoppe, which delivers prescription drugs to roughly 5,000 home-bound patients in Los Angeles; Sharon Steen, co-owner of Central Pharmacy in Santa Monica; Mark Beckwith, a quadriplegic suffering from spinal muscular atrophy who receives medical and pharmacy services under Medi-Cal; Margaret Dowling, a paraplegic who receives part of her medical services under Medi-Cal; Jason Young, an individual suffering from blindness and brain damage who receives in-home support services from a Medi-Cal managed care program; and Tran Pharmacy, Inc., a California corporation operating a retail pharmacy in Garden Grove. Independent Living Center, the Gray Panthers, and the pharmacy petitioners also sued to assert the interests of their respective patients and members. We refer to petitioner-appellants collectively as "petitioners," "Independent Living Center," or "ILC."

[2] The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

petitioners or their members have any federal right to Medi-Cal payments or benefits. We do not agree that this suit fails for this threshold reason, and therefore reverse.

I.

A.

Under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (the "Medicaid Act"), the federal government provides funds to participating states to "enabl[e] each State, as far as practicable . . . to furnish [] medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services[.]" 42 U.S.C. § 1396. Medicaid is a cooperative federal-state program, enacted by Congress pursuant to its powers under the Spending Clause, *see* U.S. CONST. art. I, § 8, cl. 1, that "'directs federal funding to states to assist them in providing medical assistance to low-income individuals.'" *Ball v. Rodgers,* 492 F.3d 1094, 1098 (9th Cir. 2007) (quoting *Katie A. v. Los Angeles County,* 481 F.3d 1150, 1153-54 (9th Cir. 2007)). To receive federal funds, states are required to administer their programs in compliance with individual "State plans for medical assistance" approved by the federal Secretary of Health and Human Services. 42 U.S.C. § 1396. The Act sets forth detailed requirements for state plans, *see id.*

§ 1396a(a)(1)-(71), including the specific provision at issue in this appeal.

Under that provision, § 1396a(a)(30)(A) ("Section 30(A)"), a state plan must:

> provide such methods and procedures relating to . . . the payment for [] care and services . . . as may be necessary . . . to assure that payments are (consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general (population in the geographic area[.]

That is, a state plan must establish reimbursement rates for health care providers that are both consistent with high-quality medical care (the "quality of care provision") and sufficient to enlist enough providers to ensure that medical services are generally available to Medicaid recipients (the "access to care provision"). *See generally Orthopaedic Hosp. v. Belshe,* 103 F.3d 1491 (9th Cir. 1997).

B.

California Assembly Bill X3 5 ("AB 5"), enacted on February 16, 2008, during a special session convened by the Governor to address the state's budget deficit, reduces payments to medical providers participating in the state's Medi-Cal program by ten percent. Section 14 of AB 5 instructs the Director of

the Department of Health Care Services, the state agency responsible for administering the Medi-Cal program, to reduce payments to physicians, dentists, pharmacies, adult day health care centers, clinics, health systems and other providers participating in Medi-Cal's fee-for-service program by ten percent. *See* CAL. WELF. & INST. CODE § 14105.19 (2008). Section 14 also reduces payments to managed health care plans under contract with the Department by the "actuarial equivalent" of ten percent. *Id.* Section 15 of AB 5 instructs the Director to reduce payments for inpatient services provided by acute care hospitals not under contract with the Department by ten percent. *See id.* § 14166.245. All of these cuts were scheduled to take effect July 1, 2008.

ILC filed this suit in California state court seeking to enjoin implementation of AB 5 on April 22, 2008, maintaining that the ten-percent rate reduction violates both the "quality of care" and "access to care" provisions of § 30(A) and is therefore invalid under the federal Constitution's Supremacy Clause, as it conflicts with governing federal law. The complaint alleged that even prior to passage of AB 5, a substantial percentage of medical care providers – 45% of primary care providers and 50% of specialists – were unwilling to participate in the Medi-Cal program due to low reimbursement rates; that 90% of dentists refused to accept Medi-Cal patients; and that Medi-Cal's reimbursement rates for prescription drugs allowed pharmacies to "uniformly earn less than a

10% net profit." By further reducing already-low reimbursement rates, ILC argued, AB 5 would drive even more primary care physicians, specialists, dentists, and pharmacies out of the Medi-Cal program and force existing providers to reduce services. As a result, ILC contended, Medi-Cal recipients would be "denied quality medical services and access to quality medical services," in violation of § 30(A). ILC also maintained that nothing in the legislative history of AB 5 demonstrated that the legislature had considered whether reduced payments would be consistent with efficiency, economy, and quality of care, or whether such payments would be sufficient to enlist an adequate network of health care providers. Rather, the sole purpose cited in the legislation was to "address [ ] the fiscal emergency declared by the Governor" and "implement cost containment measures affecting health services, at the earliest possible time." ILC therefore requested a peremptory writ of mandate or injunction to prevent the Department of Health Care Services[3] and its Director, Sandra Shewry ("the Director"), from implementing AB 5.[4]

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[3] ILC voluntarily dismissed the Department from suit on June 1, 2008, leaving the Director as the sole defendant.

[4] ILC also alleged in its complaint that the ten-percent rate reduction both violated and was preempted by the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12181 *et seq.* ILC voluntarily dismissed these claims without prejudice.

C.

The state defendants removed the suit to federal court, where ILC filed a motion for preliminary injunction. The district court denied relief, holding that although it was "acutely cognizant of the potential adverse consequences of the ten percent rate reduction," ILC had "no likelihood of succeeding on the merits" because they "do not have any federal rights under § 30(A)."

In reaching this conclusion, the district court relied heavily on this court's decision in *Sanchez v. Johnson,* which held that § 30(A) does not "create an individual right that either Medicaid recipients or providers would be able to enforce under [42 U.S.C.] § 1983." 416 F.3d 1051, 1062 (9th Cir. 2005). Although the district court acknowledged that ILC in this case filed suit under 28 U.S.C. § 1331 and the Supremacy Clause rather than under § 1983, the court viewed this as a distinction without a difference, reasoning that the Supremacy Clause – like § 30(A) – "'is not a source of any federal rights.'" *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103, 107 (1989) (quoting *Chapman v. Houston Welfare Rights Org.,* 441 U.S. 600, 613 (1979)). In the absence of any "right," the district court concluded, ILC almost surely had failed to state a claim for injunctive relief.

In so ruling, the district court rebuffed ILC's argument that it was entitled to seek purely injunctive relief – which is all it is seeking – on the basis of federal preemption under the doctrine recognized in

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). *Shaw* held that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause . . . , must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Id.* at 96 n.14. The district court held *Shaw* and its progeny – which, as we shall see, are legion – inapplicable to ILC's claims, holding that *Shaw* preemption claims have been permitted in only three "circumstances": (1) "where the plaintiff claims that a state law requires him to act in violation of federal law;" (2) "where the plaintiff contends that his conduct will be restricted by a state law that is pre-empted by federal law;" and (3) "where state law interferes with federally created rights." The court concluded that ILC's claims did not fall under any of these three categories, as "AB 5 neither compels nor restricts petitioners own conduct" and "§ 30(A) does not give rise to a federally created right." ILC's claims thus fell outside the *Shaw* Supremacy Clause doctrine, rendering its probability of success on the merits "low, if not wholly lacking."

ILC immediately sought emergency relief in this court. We granted ILC's motion to expedite oral argument, but denied the balance of its emergency motion. We heard argument on July 11, 2008, and issued an order the same day reversing the district

court's decision and remanding for consideration of the merits of ILC's motion for preliminary injunction.[5] This opinion more fully sets forth the rationale for our July 11 order.

II.

We review a district court's denial of a preliminary injunction for abuse of discretion. *The Lands Council v. McNair*, ___ F.3d ___, 2008 WL 2640001, at *3 (9th Cir. 2008) (en banc). "A district court abuses its discretion in denying a request for a preliminary injunction if it 'base[s] its decision on an erroneous legal standard or clearly erroneous findings of facts.'" *Id.* (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006)) (alteration in original). We therefore review the district court's legal rulings *de novo* and its findings of fact for clear error. *Id.*; *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157 (9th Cir. 2007).

[1] In this case, the district court denied ILC's motion for a preliminary injunction based solely on its legal ruling that ILC could not bring suit under the *Shaw* Supremacy Clause doctrine. The only issue

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[5] The district court heard argument on the merits of ILC's motion for a preliminary injunction on August 1, 2008, and subsequently entered an order granting ILC's motion in part. *See Indep. Living Ctr. v. Shewry*, No. CV 08-3315 (C.D. Cal. Aug. 18, 2008), *appeal filed*, No. 08-56422 (9th Cir. 2008).

before this court is thus whether ILC may maintain a valid cause of action to enjoin implementation of AB 5 on the basis of federal preemption.

A.

[2] The Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met, and without intimating that such claims must fit into one of three categories or "circumstances" in order to be cognizable. In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), for example, the Court enjoined a city ordinance prohibiting jet aircraft from taking off between 11 p.m. and 7 a.m. *Id.* at 625-26. Plaintiffs, the owner and operator of a private airport, filed suit under the Supremacy Clause, arguing that the Federal Aviation Act preempted the city's ordinance. *Id.* at 626-27. As the Court noted, the Act permitted the federal government "'to possess and exercise complete and exclusive national sovereignty in the airspace of the United States,'" *id.* at 626-27 (quoting 49 U.S.C. § 1508(a)), displacing both state and local regulation of airspace and – presumably – any private "right" to occupy airspace at a given time or place. Without questioning plaintiffs' authority to bring suit, the Court proceeded directly to the merits of their claim for injunctive relief, holding the city's ordinance preempted under the Supremacy Clause. *See id.* at 633, 640.

[3] In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Court proceeded along much the same path. *Ray* involved a claim for injunctive relief brought by the operators of an oil refinery and tanker vessels, who argued that the State of Washington's Tanker Law, which regulated the design, size, and movement of oil tankers in Puget Sound, was preempted by the federal Ports and Waterways Safety Act (PWSA). *Id.* at 154-56. Without comment on plaintiffs' authority to bring suit under the Supremacy Clause, the Court once again proceeded straight to the preemption analysis. *See id.* at 157. Indeed, none of the Court's seminal preemption cases casts any doubt on the presumptive availability of declaratory and injunctive relief under the Supremacy Clause; to the contrary, the Court has consistently assumed – without comment – that the Supremacy Clause provides a cause of action to enjoin implementation of allegedly unlawful state legislation. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88 (1992); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190 (1983); *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963); *see also* RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 903 (5th ed. 2003) (describing "the rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision" as "well-established").

[4] Perhaps the most well-known in this line of cases is *Shaw v. Delta Air Lines, Inc. Shaw* involved the claims of several large employers, who brought suit against the Acting Commissioner of the New York State Division of Human Rights, arguing that the State's Human Rights and Disability Benefits Laws – which required employers to treat pregnancy no differently than any other non-occupational disability – were preempted by the federal Employee Retirement Income Security Act ("ERISA"). 463 U.S. at 92. ERISA does not confer any express cause of action on employers to challenge state benefits laws in federal court,[6] but the Court – much as it had in *City of Burbank* and *Ray* – reached the merits of the preemption claims anyway, holding that the state legislation was preempted only insofar as it prohibited practices that were otherwise lawful under ERISA. *Id.* at 108-09. In an oft-cited footnote, the Court emphasized that its decision in *Franchise Tax*

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[6] Section 502(a) of the Act expressly allows participants, beneficiaries, and fiduciaries of a covered employee benefits plan, as well as the Secretary of Labor, to maintain a cause of action under ERISA. *See* 29 U.S.C. § 1132(a). The same provision, however, is silent as to employers, and has generally been interpreted to mean that an employer cannot maintain an action directly under ERISA. *See, e.g., DeMarco v. C & L Masonry, Inc.*, 891 F.2d 1236, 1240-41 (6th Cir. 1989); *Tuvia Convalescent Ctr., Inc. v. Nat'l Union of Hosp. & Health Care Employees*, 717 F.2d 726, 729-30 (2d Cir. 1983). *But see Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1278 (9th Cir. 1983) (allowing suits by employers in narrow circumstances).

Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), decided the same day, "does not call into question the lower courts' jurisdiction to decide these cases."[7] 463 U.S. at 96 n.14. Rather, the Court reaffirmed the general rule that a plaintiff seeking to enjoin state law based on federal preemption maintains a valid federal cause of action. As the Court explained,

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.[8] A plaintiff who seeks injunctive relief from state regulation, on the ground that such

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[7] *Franchise Tax Board* applied the "well-pleaded complaint rule" to hold that federal courts lacked jurisdiction to hear cases in which a defendant asserted ERISA preemption as a defense to an action brought by state tax authorities to enforce its levies against funds held in ERISA-covered employee benefit plans. 463 U.S. at 28. *Shaw* distinguished *Franchise Tax Board* by noting that the Tax Board sought a declaration that state laws were *not* preempted, whereas the employers in *Shaw* presented an affirmative claim that the state laws at issue *were* preempted. *See Shaw*, 463 U.S. at 96 n.14.

[8] Although *Shaw* utilized the term "federal rights," it did so before that term had taken on the added significance attributed to it in more recent cases such as *Gonzaga University v. Doe*, 536 U.S. 273 (2002), discussed below. *Shaw's* description of ERISA makes clear that the Court did not view the statute as creating any substantive "rights" in employers. To the contrary, the Court described ERISA as "a comprehensive statute designed to promote the interests of *employees and their beneficiaries* in employee benefit plans," 463 U.S. at 90 (emphasis added), and noted that the statute itself "does not mandate that employers provide any particular benefits," *id.* at 91.

> regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Id. (internal citations omitted). The Court concluded by noting that it "frequently has resolved pre-emption disputes in a similar jurisdictional posture," citing, *inter alia, Ray* and *Florida Lime & Avocado Growers. Id.* Thus, *Shaw* did not give rise to some unique line of "*Shaw* preemption" cases, but merely reaffirmed the traditional rule that injunctive relief is presumptively available in federal court to enjoin state officers from implementing a law allegedly preempted under the Supremacy Clause.[9] *See Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1,* 469 U.S. 256, 259 n.6 (1985) (describing *Shaw* as "reaffirming the general rule" that a plaintiff asserting preemption under the Supremacy Clause has stated a federal claim for injunctive relief).

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[9] Indeed, *Shaw* itself traced the roots of the doctrine to *Ex parte Young,* 209 U.S. 123 (1908), decided seventy-five years earlier. *See* 463 U.S. at 96 n.14. In *Young,* the Court found "ample justification" in the case law to support its conclusion that "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings . . . to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." 209 U.S. at 155-56.

B.

[5] Contrary to the district court's conclusion that "*Shaw* preemption claims" have been permitted in only three "circumstances," we know of no authority limiting *Shaw* in this manner, nor has the Director cited any. In fact, the Supreme Court recently reaffirmed *Shaw*'s holding, maintaining that it had "no doubt" as to the authority of private parties to seek injunctive relief on the basis of federal preemption under 28 U.S.C. § 1331 and the Supremacy Clause. *See Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642-43 (2002).

Nor are we certain on what grounds the district court concluded that ILC lacked a valid cause of action in this case. The first two of the district court's three "circumstances" – whether the challenged statute "restricts" or "compels" petitioners' own conduct – appear to reflect traditional standing doctrine, which requires a litigant to "demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1453 (2007). We address ILC's standing to bring suit separately below, as that inquiry raises questions apart from whether the Supremacy Clause provides a valid cause of action to seek injunctive relief on the basis of federal preemption.

The parties have proceeded on the assumption that the district court denied relief because ILC lacked any judicially enforceable "rights" under the federal statute.[10] The Director specifically urges this court to deny ILC relief "because [§ 30(A)] does not confer a private right of enforcement upon petitioners, which is the necessary predicate to seeking relief under the Supremacy Clause." Were we to accept it, this argument would work a fundamental change in Supremacy Clause jurisprudence. We decline to do so, and thus join several other circuits in holding that a plaintiff seeking injunctive relief under the Supremacy Clause on the basis of federal preemption need

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[10] As noted above, the district court also concluded that the Supremacy Clause itself does not give rise to any federal "right" to legal relief. In reaching this conclusion, however, the district court relied on a series of cases holding that the Supremacy Clause does not give rise to rights *enforceable under § 1983,* an altogether separate remedial scheme. *See Golden State Transit Corp.,* 493 U.S. at 107-08 ("Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action *pursuant to § 1983* exists every time a federal rule of law preempts state regulatory authority. Conversely, the fact that a federal statute has preempted certain state action does not preclude the possibility that the same federal statute may create a federal right *for which § 1983* provides a remedy." (emphasis added)); *Chapman,* 441 U.S. at 612-15 (holding that the Supremacy Clause "is not a source of any federal rights" falling under 28 U.S.C. § 1343(3), the jurisdictional counterpart to § 1983). We explore the distinction between claims for relief under § 1983 and claims for injunctive relief on the basis of federal preemption more fully in Part B-3 below.

not assert a federally created "right," in the sense that term has been recently used in suits brought under § 1983, but need only satisfy traditional standing requirements.

1.

[6] Although the Director asserts that the express conferral of a "private right of enforcement" on petitioners is a "necessary predicate" to a claim for injunctive relief under the Supremacy Clause, the well-established rule in both this court and in other circuits is precisely the opposite. In *Bud Antle, Inc. v. Barbosa,* 45 F.3d 1261 (9th Cir. 1994), we addressed a claim for injunctive relief brought by a large agricultural employer, who sought to enjoin the California Agricultural Relations Board (ALRB) from adjudicating various unfair labor practice charges. *Id.* at 1264. The employer argued that the ALRB proceedings were preempted by the National Labor Relations Act (NLRA), and were therefore invalid. *Id.* We held that a private party may bring an action in a federal district court seeking to enjoin allegedly unlawful state conduct, noting the "general rule that a private party may seek declaratory and injunctive relief against the enforcement of a state statutory scheme on the ground of federal preemption." *Id.* at 1269-71 (citing *Shaw*). We reached this conclusion "[e]ven in the absence of an explicit statutory provision establishing a cause of action," *id.* at 1269, and regardless of whether the NLRA conferred a federal "right" on employers, *see id.* at 1271 n.13 (finding it

unnecessary to apply the four-factor test set forth in *Cort v. Ash,* 422 U.S. 66 (1975)).

Our holding in *Bud Antle* is consistent with established practice in the other circuits, which have universally affirmed the right of private parties to seek injunctive relief under the Supremacy Clause regardless of whether the allegedly preemptive statute confers any federal "right" or cause of action. As the Tenth Circuit explained,

> A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law. A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action.

Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1266 (10th Cir. 2004) (internal citations omitted); *see also Local Union No. 12004 v. Massachusetts,* 377 F.3d 64, 75 (1st Cir. 2004) (holding that "in suits against state officials for declaratory and injunctive relief, a plaintiff may invoke the jurisdiction of the federal courts by asserting a claim of preemption, even absent an explicit statutory cause of action"); *Ill. Ass'n of Mortgage Brokers v. Office of Banks & Real Estate,* 308 F.3d 762, 765 (7th Cir. 2002); *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands,* 218 F.3d 232, 241 (3d Cir. 2000) (holding that "a state or territorial law can be unenforceable as preempted by federal law

even when the federal law secures no individual substantive rights for the party arguing preemption"); *Village of Westfield v. Welch's,* 170 F.3d 116, 124 n.4 (2d Cir. 1999) (holding that a cause of action under the Supremacy Clause "do[es] not depend on the existence of a private right of action under the [preempting statute]"); *Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor,* 107 F.3d 1000, 1005-07 (2nd Cir. 1997) (holding that plaintiff could assert ERISA preemption under the Supremacy Clause, even though it was "beyond dispute" that plaintiff fell outside ERISA's express enforcement provisions); *First Nat'l Bank of E. Ark. v. Taylor,* 907 F.2d 775, 776 n.3 (8th Cir. 1990).

2.

[7] The Director acknowledges these general principles but argues for a different result in this case, based on the specific statutory provision at issue. The Director provides little, if any, justification for treating a claim of preemption under a federal statute passed pursuant to Congress's spending power differently from a claim of preemption under any of the federal statutes discussed above. But even if she had, this argument has also been flatly rejected by the Supreme Court and the other circuits that have addressed the question.

In *Pharmaceutical Research & Manufacturers of America ("PhRMA") v. Concannon,* 249 F.3d 66 (1st Cir. 2001), *aff'd sub nom. PhRMA v. Walsh,* 538 U.S.

644 (2003), a pharmaceutical manufacturers trade group challenged a Maine statute designed to lower prescription drug prices for low-income residents by essentially requiring manufacturers to issue rebates.[11] *Id.* at 71-72. PhRMA argued, *inter alia,* that Maine's statute was preempted by the federal Medicaid Act under the Supremacy Clause, and moved for injunctive relief to prevent implementation of the program. *Id.* at 72. In response, the defendants contended that PhRMA could not bring suit in this manner, as the Medicaid Act was not intended to confer any private right on pharmaceutical manufacturers. *Id.* at 73. The First Circuit rejected the defendants' argument, explaining that "PhRMA has not asserted an action to enforce rights under the Medicaid statute . . . but rather a preemption-based challenge under the Supremacy Clause. In this type of action, it is the interests protected by the Supremacy Clause, not by the preempting statute, that are at issue." *Id.* Citing a decision from the Third Circuit, the court noted:

> We know of no governing authority to the effect that the federal statutory provision which allegedly preempts enforcement of local legislation by conflict must confer a right

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[11] To ensure pharmaceutical companies' participation in the program, the statute subjected all drugs produced by manufacturers refusing to offer rebates to "prior authorization requirements," meaning that the drug could not be prescribed to a Medicaid beneficiary unless the state Medicaid administrator specifically approved the prescription. *See id.* at 71-72.

> on the party that argues in favor of preemption. On the contrary, a state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption.

Id. (quoting *St. Thomas-St. John Hotel & Tourism Ass'n,* 218 F.3d at 241). The court thus concluded – in stark contrast to the Director's position in this case – that "regardless of whether the Medicaid statute's relevant provisions were designed to benefit PhRMA, PhRMA can invoke the statute's preemptive force." *Id.*

Although the First Circuit permitted PhRMA to bring suit, the court ultimately held that Maine's statute was not preempted by federal law because there was no conflict between its requirements and those of the Medicaid Act. *See id.* at 74-79. PhRMA successfully petitioned the Supreme Court for certiorari, and the state defendants renewed their claim that PhRMA lacked any federal right to bring suit. Like the Director in our case, defendants argued that "[the Supremacy Clause] does not, by its own force, protect or regulate any interests," and that PhRMA must therefore "look to the allegedly preempting federal statute to find an interest to support standing." Brief for Respondents at 13-17, *PhRMA v. Walsh,* 538 U.S. 644 (2003) (No. 01-188). PhRMA took issue with this claim in its reply brief, noting that the Supreme Court and the lower federal courts had "decided innumerable cases in which parties claiming

to be injured by a state law have challenged it as preempted by federal law" and that the Court had never held "that a party directly claiming a Supremacy Clause violation must demonstrate an enforceable right under the preemptive federal law." Reply Brief of Petitioner at 2-3, *PhRMA v. Walsh,* 538 U.S. 644 (2003) (No. 01-188).

Not acceding to the defendants' argument that PhRMA lacked a cause of action under the Supremacy Clause, seven Justices reached the merits of PhRMA's claim for injunctive relief. *See PhRMA v. Walsh,* 538 U.S. at 668 (Stevens, J., joined by Souter, J., and Ginsburg, J.); *id.* at 671 (Breyer, J.); *id.* at 684 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J.). Only Justices Scalia and Thomas would have denied PhRMA's ability to bring suit for preemption, although they ultimately concurred in the Court's judgment that Maine's statute was likely not preempted by the federal Medicaid Act. *See id.* at 675 (Scalia, J., concurring in judgment); *id.* at 675-83 (Thomas, J., concurring in judgment).[12] Faced with

[12] Justices Scalia would have held that PhRMA could not bring suit, because "the remedy for the State's failure to comply with the obligations it has agreed to undertake under the Medicaid Act is set forth in the Act itself: termination of funding." *See id.* at 675 (Scalia, J., concurring in judgment). Justice Thomas argued that the broad discretion conferred by statute on the Secretary of Health and Human Services defeated any preemption claim, and doubted whether "Spending Clause legislation can be enforced by third parties in the absence of a private right of action." *See id.* at 675-83 (Thomas, J., concurring in judgment).

arguments similar to those presented by the Director in this case, the Court necessarily assumed – albeit implicitly – that a private party seeking to enjoin implementation of a state law allegedly preempted by the federal Medicaid Act may bring suit for injunctive relief directly under the Supremacy Clause.

Although the Supreme Court's decision in *Walsh* affirmed PhRMA's ability to bring suit under the Supremacy Clause *sub silentio,* two circuits have expressly relied on *Walsh* to permit suits for injunctive relief. In *PhRMA v. Thompson,* 362 F.3d 817 (D.C. Cir. 2004), the D.C. Circuit addressed a similar challenge to Michigan's "Best Practices Initiative," which was designed – much like Maine's statute – to provide low-cost prescription drug coverage to state residents. *Id.* at 819. Citing Justice Thomas's opinion in *Walsh,* the defendants argued that there were "serious questions as to whether third parties may sue to enforce Spending Clause legislation – through pre-emption or otherwise." *Id.* at 819 n.3. The D.C. Circuit rejected defendants' argument, holding that by reaching the merits of PhRMA's preemption claim in *Walsh,* the Supreme Court implicitly affirmed PhRMA's authority to bring suit for injunctive relief under the Supremacy Clause. *Id.*

In *Planned Parenthood of Houston v. Sanchez,* 403 F.3d 324 (5th Cir. 2005), the Fifth Circuit relied in part on the Supreme Court's decision in *Walsh* to permit a claim for injunctive relief under the federal Social Security and Public Health Services Acts. *Id.* at 331-32. Several local branches of Planned

Parenthood claimed that a Texas statute known as "Rider 8," which restricted the distribution of public funds for family planning services to contractors who pledged not to perform, or to contract with any individual or entity that performed, any elective abortion procedures, was preempted by federal law.[13] *Id.* at 328. Plaintiffs argued, *inter alia,* that the state statute violated the Supremacy Clause by imposing eligibility requirements that were inconsistent with those imposed under the federal funding statutes. *Id.*

In assessing plaintiff's claims for injunctive relief, the Fifth Circuit began by noting that "[i]t is well-established that the federal courts have jurisdiction under 28 U.S.C. § 1331 over a preemption claim seeking injunctive and declaratory relief." *Id.* at 331 (citing *Shaw*). The court then cited *Walsh* and *Thompson* for the principle that "asserting the preemptive force of federal Spending Clause legislation" itself states a claim for relief, even if "[Planned Parenthood was] not seeking to vindicate any right or to enforce any duty running to them." *Id.* at 331-32. After a thorough canvassing of preemption cases, *see id.* at 331-34 & nn.25, 27-28, 37, 46-47, the court had "little difficulty . . . holding that [Planned Parenthood had] an implied right of action to assert a preemption

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[13] Texas accepted federal funds for family planning services by voluntarily participating in a number of federal programs, including the Public Health Services Act and the Social Security Act. *Id.* at 327.

claim seeking injunctive and declaratory relief." *Id.* at 335.

[8] We find the reasoning of the D.C. and Fifth Circuits persuasive.[14] For more than a century, federal courts have entertained suits seeking to enjoin state officials from implementing state legislation allegedly preempted by federal law, and we see no reason to depart from the general rule in this case, or in this category of cases. We therefore join several other circuits in holding that a party may seek injunctive relief under the Supremacy Clause regardless of whether the federal statute at issue confers any substantive rights on would-be plaintiffs.

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[14] The district court stated that ILC's reliance on *Concannon* was misplaced because plaintiffs in that case had "established a concrete injury in fact" – standing language, as we shall see – whereas "[h]ere, § 30(A) does not give petitioners any right to Medi-Cal funds." In fact, *Concannon* expressly permitted PhRMA to bring suit for injunctive relief in the absence of any statutory right to Medicaid funds. *See* 249 F.3d at 73. The pharmaceutical manufacturers bringing suit in *Concannon* had no greater "right" to Medicaid funds than the pharmacies and health care providers in this case, and ILC has adequately alleged injury-in-fact. *See* Part II-C, *infra*.

Similarly, there is no viable distinction for present purposes between the restrictions on Planned Parenthood's activities imposed by the statute at issue in *Planned Parenthood v. Sanchez* and the impact of AB 5 on the Medi-Cal providers in this case. AB 5 allegedly prevents petitioners from providing services to Medi-Cal beneficiaries unless they are willing to do so at a financial loss, and thus assuredly "restricts" petitioners' provision of professional services.

3.

[9] The reasoning adopted by the other circuits is also helpful in identifying the fundamental flaw with the Director's position. By maintaining that ILC cannot proceed unless it can demonstrate that AB 5 interferes with some federally created right, the Director essentially asks us to apply the test for determining whether a plaintiff may seek relief under 42 U.S.C. § 1983, which provides a remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[15] The Supreme Court has interpreted the text of § 1983 to require a plaintiff to show the deprivation of "an unambiguously conferred right" in order to support a cause of action brought under § 1983. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002). But both the Supreme Court and the courts of appeal have consistently rejected attempts to extend this analysis to claims for purely prospective injunctive relief under the Supremacy Clause, rendering the "rights" requirement inapplicable to ILC's claims in this case.

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[15] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983.

The Eighth Circuit's decision in *Lankford v. Sherman,* 451 F.3d 496 (8th Cir. 2006), is instructive. In response to severe "budget constraints," the Missouri state legislature amended its state Medicaid plan to eliminate coverage for durable medical equipment ("DME") for most categorically-needy Medicaid recipients. *Id.* at 500-01. Plaintiffs, a group of adult Medicaid recipients, brought suit under both § 1983 and the Supremacy Clause to enjoin state regulations implementing the amendment, arguing that the cuts violated certain provisions of the federal Medicaid Act. *Id.* at 500-02. Like the Director in our case, the defendant argued "that there is no individualized federal right to reasonable Medicaid standards." *Id.* at 507. The court agreed with the defendant *as to the § 1983 claim,* holding that "[r]ather than focusing on an individualized entitlement to medical services, the reasonable-standards provision [of the Medicaid Act] focuses on the aggregate practices of the states in establishing reasonable Medicaid services." *Id.* at 509. The court noted, however, that the § 1983 issue was not dispositive, as plaintiffs had also brought suit under the Supremacy Clause. "Preemption claims are analyzed under a different test than section 1983 claims, affording plaintiffs an alternative theory for relief when a state law conflicts with a federal statute or regulation." *Id.* The lack of any federally created "right" under the Medicaid Act was inconsequential to the Supremacy Clause analysis, and plaintiffs' preemption claim was remanded for consideration on the merits. *Id.* at 513.

The Fifth Circuit reached a similar conclusion in *Planned Parenthood v. Sanchez.* As noted above, plaintiffs sought to enjoin implementation of Texas's Rider 8, which required recipients of federal funds to cut all ties with any organization performing elective abortions. *Sanchez,* 403 F.3d at 328. Advancing the same arguments asserted by the Director in our case, the Texas Department of Health contended that to seek injunctive relief, "plaintiffs must meet the requirements for an action under § 1983, as recently enunciated in *Gonzaga University v. Doe,*" namely, that the federal statutes at issue confer privately enforceable "rights." *Id.* at 335. The Fifth Circuit flatly rejected this argument, finding that it "mischaracterize[d]" Planned Parenthood's claim:

> Appellees are not asking the courts to enforce their "right" under § 1983 to secure enforcement of [the Public Health Safety Act], as TDH asserts. Rather, Appellees' Supremacy Clause argument is fundamentally different: they argue that Rider 8 imposes conditions on the receipt of federal funds that are incompatible with [the Act]. Therefore, we need not be concerned that the Supremacy Clause does not of its own force create rights enforceable under § 1983.

Id. The court then noted that "*Gonzaga,* by its terms, applies only to § 1983 claims. . . . The Supremacy Clause claim advanced here . . . is not based on a claim of right under [the Act], nor is it a claim for damages; it is a preemption claim. The *Gonzaga* Court gave no indication that it intended to alter its

prior practice regarding such claims." *Id.* The court therefore concluded that a claim of preemption under the Supremacy Clause "does not require a showing, as per *Gonzaga,* that a § 1983 action would also be proper." *Id.*; *see also Local Union No. 12004,* 377 F.3d at 75-76 (distinguishing between claims brought under § 1983 and claims for injunctive relief under the Supremacy Clause); *Qwest,* 380 F.3d at 1266 & n.5 (same); *Burgio & Campofelice,* 107 F.3d at 1005-07 & n.2 (same).

For the reasons identified by the Fifth Circuit in *Planned Parenthood v. Sanchez,* the Director's heavy reliance on our decision in *Sanchez v. Johnson,* 416 F.3d 1051 (9th Cir. 2005), is misplaced. *Johnson* merely applied *Gonzaga* to a claim seeking to enforce the substantive provisions of § 30(A) of the Medicaid Act *brought under § 1983.* We held that the quality of care and access provisions of § 30(A) do not give rise to the type of unambiguously conferred "rights" required under *Gonzaga. See id.* at 1055-60. But our decision in *Johnson* had nothing to say about a claim for injunctive relief brought under the Supremacy Clause.

[10] Indeed, even as the Supreme Court has tightened the requirements for seeking damages under § 1983, it has consistently reaffirmed the availability of injunctive relief to prevent state officials from implementing state legislation allegedly preempted by federal law. In *Green v. Mansour,* 474 U.S. 64 (1985), two classes of plaintiffs alleged that the State of Michigan's method of calculating benefits

under the federal Aid to Families With Dependent Children (AFDC) program violated federal law. *Id.* at 65. While the suits were pending in federal district court, the State altered its program to comply with recent congressional amendments. *Id.* at 65-66. These changes mooted plaintiffs' claims for prospective relief, since it was "undisputed that respondent's calculations thereafter have conformed to federal law." *Id.* at 65. Plaintiffs nonetheless sought "notice relief" and a declaration that Michigan's prior conduct violated federal law. *Id.*

The Court denied relief, holding that plaintiffs' requests for notice and declaratory relief constituted claims for retrospective damages and were thus barred by state sovereign immunity under the Eleventh Amendment. *Id.* at 71-74. All nine justices agreed, however, that injunctive relief would have been available under the Supremacy Clause if changes to the state program had not mooted plaintiffs' prospective claims. *See id.* at 68; *id.* at 77 (Brennan, J., dissenting). Writing for the majority, then-Justice Rehnquist noted that "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.* at 68.

[11] The Director's arguments fail to honor this distinction, broadly asserting instead that because § 30(A) of the Medicaid Act does not confer any substantive "rights," ILC is not entitled to relief of any

kind, whether prospective or retrospective. *Green* cautioned against conflating claims for prospective and retrospective relief in precisely this manner, recognizing that a state's interest in continuing to flout binding federal law is illegitimate. 474 U.S. at 68; *see also Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 281 (1997) ("An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient" to seek injunctive relief under *Ex parte Young*). We therefore adhere to the general rule that injunctive relief is presumptively available to remedy a state's ongoing violation of federal law.

C.

[12] Because it held that ILC could not bring suit under the Supremacy Clause, the district court did not technically reach petitioners' standing to bring suit. As noted above, however, the first and second prongs of the district court's *Shaw* analysis – which focused on whether AB 5 "restricts" or "compels" petitioners' conduct – appear to reflect the traditional requirement that a litigant demonstrate an injury-in-fact to establish Article III standing. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). On appeal, the Director expressly "does not allege that the named Petitioners do not have standing to bring this action on their own behalf," but rather argues simply that "Petitioners cannot state a

claim for relief under the Supremacy Clause."[16] We nonetheless recognize our "independent obligation" to examine our own jurisdiction, *see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990), and therefore briefly address ILC's Article III standing.[17]

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[16] Although the Director does not contest petitioners' standing, she does argue that the interests protected by § 30(A) are not judicially enforceable because § 30(A) concerns "overall methodology" and "merely requires states to consider various factors in setting reimbursement rates." We express no opinion regarding the correct interpretation of the substantive provisions of § 30(A), as such arguments are properly addressed to the merits of petitioners' preemption claim. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 519 (1990) ("That [the statutory provision at issue] gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the [statute], but it does not render the [statute] unenforceable by a court."); *Orthopaedic Hosp.*, 103 F.3d at 1496-1500 (interpreting the substantive provisions of § 30(A)).

[17] Unlike the Article III standing inquiry, whether ILC maintains prudential standing "is not a jurisdictional limitation on our review." *See Bd. of Natural Res. v. Brown*, 992 F.2d 937, 945-46 (9th Cir. 1993). By failing to articulate any argument challenging ILC's prudential standing, the Director has waived that argument. *Id.* at 946; *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim. . . ." (internal citation omitted)).

[13] To satisfy Article III standing requirements, a plaintiff must demonstrate three elements:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (internal citations and quotation marks omitted). "The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." *Leonard v. Clark,* 12 F.3d 885, 888 (9th Cir. 1993). In this case, we have no doubt that several of the petitioners, at least, have standing to challenge the implementation of AB 5.

[14] Petitioners include independent pharmacies and health care providers participating in the State's Medi-Cal program that, according to their complaint, will be "directly injured, by loss of gross income," when the ten-percent rate reduction takes effect. The Supreme Court "repeatedly has recognized

that such [direct economic] injuries establish the threshold requirements" of Article III standing. *Craig v. Boren,* 429 U.S. 190, 194-95 (1976). Moreover, this injury is directly traceable to the Director's implementation of AB 5, and would certainly be redressed by a favorable decision of this court enjoining the ten-percent rate reduction.

[15] Petitioners also include several individual Medi-Cal beneficiaries, who "will be injured or put at risk of injury by implementation of the 10% provider payments cuts" because those cuts will reduce "quality services, and access to quality services." This injury, like the injury to medical providers discussed above, is the direct result of the Director's implementation of AB 5, and would certainly be remedied by a decision granting injunctive relief. Such an injury "to those individuals most directly affected by the administration of [a state welfare] program" is sufficient to allow petitioners to seek injunctive relief in federal court. *Rosado v. Wyman,* 397 U.S. 397, 420 (1970).

Conclusion

Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law. In this case, ILC alleges that the cuts mandated by AB 5 violate the substantive provisions of the federal Medicaid Act, and are therefore unlawful. They do not seek to enforce any

substantive "right" conferred by statute; instead, they argue that the cuts mandated by AB 5 are themselves unenforceable, because they exceed the scope of the State's discretion under the Act and violate federal standards. As AB 5 is causing injury to one or more of the plaintiffs and the other requirements of Article III standing are met, no more is required to allow this suit to go forward.

We express no opinion on the merits of ILC's preemption claim. Rather, we simply reaffirm over a century's worth of precedent and hold that ILC maintains a valid cause of action under the Supremacy Clause to assert such a claim for injunctive relief. The district court's opinion is therefore REVERSED and REMANDED for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF CALIFORNIA
WESTERN DIVISION

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, et al., Petitioners vs. SANDRA SHEWRY, Director of Department of Health Services of the State of California, et al., Respondents.	Case No. CV 08-3315 CAS (MANx) ORDER DENYING PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION (Filed Jun. 25, 2008)

I. INTRODUCTION

On April 22, 2008, petitioners filed a verified petition for writ of mandamus in the Los Angeles County Superior Court, seeking mandamus and injunctive relief against the California Department of Health Care Services ("the Department"), Sandra Shewry, Director of the Department ("the Director"), and Does 1 through 50.[1] The Department is a California agency

[1] Petitioners are the Independent Living Center of Southern California, Inc.; Gray Panthers of Sacramento; the Gray Panthers of San Francisco; Gerald Shapiro, Pham.D., d/b/a Uptown Pharmacy and Gift Shoppe; Sharon Steen, d/b/a Central Pharmacy; Mark Beckwith; Margaret Dowling; Tran Pharmacy, Inc., d/b/a Tran Pharmacy; and Jason Young.

charged with the administration of California's Medicaid program, Medi-Cal. Petitioners are health care advocates and Medi-Cal providers and recipients.

On February 16, 2008, the California Legislature enacted Assembly Bill X3 5 ("AB 5") in special session. First Amended Petition ¶ 20. Section 14 of AB 5 adds Cal. Welf. & Inst. Code § 14105.19, which reduces by ten percent payments under the Medi-Cal fee-for-service program for physicians, dentists, pharmacies, adult day health care centers, clinics, health systems, and other providers for services provided on or after July 1, 2008. Cal. Welf. & Inst. § 14105.19(b)(1); First Amended Petition ¶ 22. California Welfare & Institutions Code § 14105.19 also reduces payments to managed care plans by the actuarial equivalent of the ten percent payment reduction. Cal. Welf. & Inst. § 14105.19(b)(3); First Amended Petition ¶ 22. Section 15 of AB 5 adds Cal. Welf. & Inst. Code § 14166.245, which reduces payments to acute care hospitals not under contract with the Department for inpatient services provided on or after July 1, 2008. Cal. Welf. & Inst. § 14166.245(c); First Amended Petition ¶ 23.[2] These

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[2] The Department is authorized to contract with individual hospitals for the exclusive right to treat Medi-Cal patients. Cal. Welf. & Inst. § 14081; *Cedars-Sinai Med. Ctr. v. Shewry*, 137 Cal. App. 4th 964, 969-70 (2006). Contracting hospitals are reimbursed by the Department at the negotiated contract rate, and once the Department has contracted with enough hospitals to meet the needs of Medi-Cal beneficiaries in a geographic area, it awards no further contracts in that area. *Cedars-Sinai*, 137

(Continued on following page)

rate and payment reductions are referred to herein as the "ten percent rate reduction."

Petitioners allege that the ten percent rate reduction violates Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* ("the Medicaid Act"), and therefore, may not be implemented. Petitioners seek declaratory relief and injunctive relief to restrain the implementation of the ten percent rate reduction.

On May 19, 2008, respondents removed this action to this Court, based on federal question jurisdiction. On May 28, 2008, petitioners filed the operative first amended petition against the Department and the Director. On June 1, 2008, petitioners voluntarily dismissed the Department as a respondent in this case without prejudice.

On May 30, 2008, petitioners filed the instant motion for preliminary injunction. Respondents filed their opposition thereto on June 12, 2008.[3] On June 16, 2008, petitioners filed a reply. A hearing was held on June 23, 2008, and the Court took this matter under submission. After carefully considering the parties' arguments, the Court denies petitioners' motion for the reasons set forth below.

Cal. App. 4th at 970. Noncontract hospitals are only reimbursed for treating Medi-Cal patients under certain circumstances, including where emergency care or services are provided. *Id.*

[3] By order dated June 19, 2008, the Court granted respondents' ex parte application to allow for the late filing of their instant opposition.

II. BACKGROUND

The Medicaid Act authorizes the federal government to distribute funds to participating states for the purpose of providing medical assistance to low income persons who are aged, blind, disabled, or members of families with dependent children. Medicaid is a cooperative federal program: the federal government provides federal funding to the states so that states may provide medical care to their needy citizens. State participation is voluntary; however, once a state chooses to participate by accepting federal funds, it must comply with requirements imposed by the Medicaid Act.

Because California has elected to participate in the Medicaid program, it must administer its state Medicaid program, known as Medi-Cal, in compliance with a state plan that has been pre-approved by the Secretary of the U.S. Department of Health and Human Services ("the Secretary"), and which complies with the requirements set forth in 42 U.S.C. § 1396a(a)(1)-(70). In accordance with these requirements, California must also provide methods and procedures for the payment of care and services that are consistent with efficiency, economy, and quality of care, and that ensure their availability to the Medicaid population to the same extent as they are available to the general population in the geographic area. 42 U.S.C. § 1396a(30)(A) ("§ (30)(A)").

Further, under California law, the Department must administer Medi-Cal in accordance with the

state plan; applicable state law, as specified in the Welfare and Institutions Code; and Medi-Cal regulations. Cal. Code Regs. tit. 22, § 50004(b).

Petitioners now move to preliminary enjoin the implementation of the ten percent rate reduction. The request for a preliminary injunction is predicated only on petitioners' first and second claims for relief.[4] In their first and second claims, petitioners allege the ten percent rate reduction violates 42 U.S.C. § 1396a(30)(A), which requires that a state plan must:

> provide such methods and procedures relating to the utilization of, and payment for, care and services available under the plan . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and

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[4] The first amended petition asserts four claims for relief. Petitioners' first claim is asserted by each of the petitioners except petitioner Jason Young. Petitioners' second claim is brought by petitioners Young and the Tran Pharmacy, Inc., d/b/a Tran Pharmacy. Petitioners third and fourth claims allege that §§ 14 and 15 of AB 5 are unenforceable because they are preempted by and violate the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12181 *et seq.* However, because petitioners' motion for preliminary injunction is predicated only on the first and second claims, and only on their Supremacy Clause theory raised in their motion papers, those are the only claims and argument that the Court addresses herein.

> services are available to the general population in the geographic area.

Petitioners allege that the Department and the Legislature improperly failed to consider efficiency, economy, and quality of care as required by § 30(A) in enacting the ten percent reduction, and that as a result of AB 5, there will not be a sufficient number of providers to provide equal access to healthcare as mandated by § 30(A).

III. LEGAL STANDARD

A preliminary injunction is appropriate when the moving party shows either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in the moving party's favor. *See Rodeo Collection, Ltd. v. West Seventh,* 812 F.2d 1215, 1217 (9th Cir. 1987). These are not two distinct tests, but rather "the opposite ends of a single 'continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.'" *Id.* A "serious question" is one on which the movant "has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1421 (9th Cir. 1984).

IV. DISCUSSION

The "quality of care" provision of § (30)(A) provides that

> [a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care.

42 U.S.C. § 1396a(30)(A). The "equal access" provision of § 30(A) provides that

> [a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are . . . sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

Id.

In *Sanchez v. Johnson,* 416 F.3d 1051 (9th Cir. 2005), the Ninth Circuit held that § 30(A) does not confer individual rights that are enforceable under 42

U.S.C. § 1983. *Id.* at 1060. There, plaintiffs, consisting of a class of developmentally disabled individuals and several organizations, brought suit against California officials charged with the administration of programs for persons with developmental disabilities. *Id.* at 1053-54. The plaintiffs asserted claims under 42 U.S.C. § 1983, alleging that the defendants violated § 30(A) by failing to fund adequately community-based programs for persons with developmental disabilities. *Id.* at 1055. The district court found that in light of the Supreme Court's decision in *Gonzaga University v. Doe,* 536 U.S. 273 (2002), the Medicaid Act did not confer individual rights that were enforceable by recipients of Medicaid funding or providers of Medicaid services, under 42 U.S.C. § 1983.[5] *Id.* The district court therefore granted judgment on the pleadings in favor of the defendants. *Id.*

On appeal, the Ninth Circuit affirmed. The court reasoned that § 30(A) did not "focus[ ] on the rights of a specific class of beneficiaries." *Id.* at 1059. The court found that instead, "§ 30(A) is concerned with overall methodology rather than conferring individually enforceable rights on individual Medicaid recipients." *Id.* at 1059-60. Because a plaintiff seeking to prosecute a claim under 42 U.S.C. § 1983 must "assert the violation of an individually enforceable *right* conferred specifically upon him, not merely a violation of

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[5] In *Gonzaga,* the Supreme Court clarified the standard for determining whether a federal statute creates rights enforceable under 42 U.S.C. § 1983.

federal law," and because § 30(A) does not manifest a congressional intent to confer individual rights, the court found that the Medicaid Act did not give rise to rights enforceable under 42 U.S.C. § 1983. *Id.* at 1062 (emphasis in original).[6]

It is true, as petitioners argue, that in *Sanchez* the Ninth Circuit was presented with the question of whether individuals may invoke 42 U.S.C. § 1983 to sue for an alleged violation of § 30(A). However, in order to decide that issue the Ninth Circuit was first required to determine whether § 30(A) gives rise to any federally created individual rights: in evaluating "whether a statutory violation may be enforced through § 1983 . . . [a court] must first determine whether Congress *intended to create a federal right. Gonzaga,* 536 U.S. at 283 (emphasis in original). Thus, in deciding that the *Sanchez* plaintiffs could not enforce § 30(A) under 42 U.S.C. § 1983, the Ninth Circuit necessarily concluded that § 30(A) does not create any individual federal rights.

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[6] The Court notes that there is a circuit split concerning whether plaintiffs can sue for alleged violations by state officials of § 30(A) under 42 U.S.C. § 1983. Specifically, the Fifth, Sixth, Ninth, and Tenth Circuit Courts of Appeal have found that Medicaid beneficiaries cannot sue for alleged violations of § 30(A) under 42 U.S.C. § 1983. On the other hand, the Eighth Circuit has concluded that § 30(A) creates individual rights that can be the subject of suit under 42 U.S.C. § 1983. There is currently pending a petition for certiorari to the Supreme Court from the judgment in the Fifth Circuit case, *Equal Access for El Paso, Inc. v. Hawkins,* 509 F.3d 697 (5th Cir. 2007), *cert. pending* (U.S. Supreme Ct. No. 07-1160) (filed March 10, 2008).

Because after *Sanchez,* petitioners do not have any claims for relief under 42 U.S.C. § 1983 by which to seek redress for violations of § 30(A), petitioners seek to avail themselves of a claim for relief allegedly arising directly under the Supremacy Clause, Article VI, § 2, of the United States Constitution. However, the Supremacy Clause, of its own force, does not create any rights enforceable under 42 U.S.C. § 1983. *See Golden State Transit Corp. v. L.A.,* 493 U.S. 103, 108 (1989) ("'[The Supremacy] clause is not a source of any federal rights'; it [']secures federal rights by according them priority whenever they come in conflict with state law.'") (quoting *Chapman v. Houston Welfare Rights Org.,* 441 U.S. 600, 613 (1979)).

In an attempt to avoid the effect of *Sanchez,* petitioners rely on cases following *Shaw v. Delta Air Lines,* 463 U.S. 85 (1983), to argue that AB 5 is preempted by the Medicaid Act, and therefore invalid under the Supremacy Clause, such that they are entitled to relief based on an implied right of action under the Supremacy Clause. In opposition, respondents argue that the Supremacy Clause does not confer any rights on petitioners. Respondents assert that petitioners therefore lack standing to maintain this suit.

In *Shaw,* the United States Supreme Court stated that

> [i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A

> plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw, 463 U.S. at 96 n.14; *see e.g., Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 641-43 (2002) (stating that the district court has federal question jurisdiction under 28. U.S.C. § 1331 in a suit where the plaintiff claimed that the Federal Communications Commission's order was preempted by federal law); *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 259 n.6 (1985) (stating that the Eighth Circuit erroneously concluded that a district court lacked subject matter jurisdiction where the affected plaintiff school district alleged that a South Dakota statute conflicted with federal law and was therefore invalid under the Supremacy Clause); *see also Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir. 1989).

Shaw preemption claims have been permitted in three circumstances. First, where the plaintiff claims that a state law requires him to act in violation of federal law.[7] Second, such claims have been allowed

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[7] *See e.g., Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256, 258, 260-61 (1985) (after Lawrence

(Continued on following page)

where the plaintiff contends that his conduct will be restricted by a state law that is preempted by federal law.[8] Third, courts have entertained *Shaw*

County refused to distribute federal funds to the school district in accordance with a state statute, arguing that federal law gave it the discretion to spend the federal funds for any governmental purpose it chose, the school district filed suit seeking to compel Lawrence County to distribute the federal funds); *Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor*, 107 F.3d 1000, 1005-07 (2d Cir. 1997) (suit by a public works contractor to enjoin the New York Department of Labor from enforcing a state wage law, alleging the state law was preempted by ERISA); *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 641-42 (2002) (Verizon sued the Maryland Public Service Commission alleging that the Federal Communications Commission's order requiring Verizon to make payments under a negotiated interconnection agreement violated the Telecommunications Act of 1996); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1264 (10th Cir. 2004) (suit by telecommunications provider challenging local ordinance that imposed several requirements on telecommunications providers before they could access city-owned rights-of-way).

[8] *See e.g., City of L.A. v. County of Kern*, 509 F. Supp. 2d 865, 889 (C.D. Cal. 2007) (where the plaintiffs challenged a local ordinance on that grounds that it was preempted by state law, the court analogized the law of preemption under the California Constitution to that under the Supremacy Clause, and held that the plaintiffs had standing to bring suit because their "conduct would be restricted by a local ordinance they challenge[d] as preempted, even if the plaintiffs d[id] not assert rights protected by the preempting statute itself"); *Planned Parenthood of Cent. Tex. v. Sanchez*, 280 F. Supp. 2d 590, 596, 599-602 (W.D. Tex. 2003) (family planning and abortion services provider challenged state statute that precluded payment of Medicaid funds to organizations providing abortions services); *St. Thomas – St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands*, 218 F.3d 232, 240-42 (3d Cir. 2000) (challenge to territorial law

(Continued on following page)

preemption claims where state law interferes with federally created rights.[9]

Here, AB 5 neither compels nor restricts petitioners' own conduct. In order to state a claim, petitioners must therefore show that AB 5 interferes with some individual federal right that arises under § 30(A). However, for the reasons stated *supra,* § (30)(A) does not give rise to a federally created right.[10]

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providing that an employee discharged for any reason other than for cause as set forth in nine enumerated reasons will be considered to have been wrongfully discharged).

[9] *See e.g., League of Women Voters v. Blackwell,* 340 F. Supp. 2d 823, 827-28 (N.D. Ohio 2004) (challenge to Ohio Secretary of State's directive prescribing procedures for obtaining identification from first-time voters).

[10] Petitioners reliance on *Orthopaedic Hospital v. Belshe,* 103 F.3d 1491 (9th Cir. 1997), decided before *Sanchez,* is misplaced. There, the plaintiff-providers filed suit under 42 U.S.C. § 1983, claiming that the Director violated § 30(A) by setting reimbursement rates for hospital providers of outpatient services without considering hospital costs. *Orthopaedic Hosp.,* 103 F.3d at 1492. In that case, however, there was no discussion of whether plaintiffs had any federally created individual rights. However, because *Sanchez* has decided that no individual right to sue is conferred by § 30(A), it appears that the holding of *Orthopaedic Hospital* is not controlling on that issue.

The cases addressed by petitioners at the hearing held herein are similarly unavailing. In *Ball v. Rodgers,* 492 F.3d 1094 (9th Cir. 2007), the court, noting that after *Sanchez,* § 30(A) cannot be enforced under 42 U.S.C. § 1983, analyzed different provisions of the Medicaid Act, which it determined, unlike § 30(A), gave rise to individual rights. In *Day v. Apoliona,* 496 F.3d 1027 (9th Cir. 2007), the Ninth Circuit applied the factors set forth in *Blessing v. Freestone,* 520 U.S. 329 (1997),

(Continued on following page)

Because petitioners do not have any federal rights under § 30(A), their probability of success on the claims at issue here is low, if not wholly lacking.[11] *See Golden State Transit Corp. v. L.A.*, 493 U.S. *supra* at 108 (1989) ("'[The Supremacy] clause is not a source of any federal rights'; it ['']secures federal rights by according them priority whenever they come in conflict with state law.'") (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

In light of the Court's finding that petitioners have no likelihood of succeeding on the merits, the

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and *Gonzaga University v. Doe*, 536 U.S. 273 (2002), to conclude that beneficiaries of a trust had individual rights that could be enforced under 42 U.S.C. § 1983. *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615 (9th Cir. 2005), involved a challenge under the ADA.

[11] Petitioners' reliance on *Burgio & Campofelice, Inc. v. New York State DOL*, 107 F.3d 1000 (2d Cir. 1997) is also misplaced. In *Burgio & Campofelice, Inc.*, the plaintiff argued that the allegedly preempted state statute improperly caused the withholding of money that it was due under a public works contract. *Burgio & Campofelice, Inc.*, 107 F.3d at 1005-06. In *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001), the First Circuit concluded that the plaintiff had standing to assert a claim under the Supremacy Clause reasoning that "[w]here a party has established a concrete injury in fact, and otherwise has standing to challenge the lawfulness of the statute, it is entitled to assert those concomitant rights of third parties that would be diluted or adversely affected should [its] constitutional challenge fail and the statute[ ] remain in force." *Id.* at 74 (internal quotations omitted; alterations in original). Here, § 30(A) does not give petitioners any right to Medi-Cal funds.

Court, while acutely cognizant of the potential adverse consequences of the ten percent rate reduction, declines to address petitioners' arguments that they have shown irreparable harm. *See Global Horizons, Inc. v. United States DOL,* 510 F.3d 1054, 1058 (9th Cir. 2007) ("Once a court determines a complete lack of probability of success or serious questions going to the merits, its analysis may end, and no further findings are necessary.").

V. CONCLUSION

In accordance with the foregoing, the Court hereby DENIES petitioners' motion for preliminary injunction.

IT IS SO ORDERED.

Dated: June 25, 2008

/s/ Christina A. Snyder
CHRISTINA A. SNYDER
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., a nonprofit corporation; GRAY PANTHERS OF SACRAMENTO, a nonprofit corporation; GRAY PANTHERS OF SAN FRANCISCO, a non-profit corporation; GERALD SHAPIRO, PHARM. D. doing business as UPTOWN PHARMACY AND GIFT SHOPPE; SHARON STEEN doing business as CENTRAL PHARMACY; MARK BECKWITH; MARGARET DOWLING; TRAN PHARMACY, INC., doing business as TRAN PHARMACY; JASON YOUNG,

Petitioners-Appellants,

v.

SANDRA SHEWRY, Director of the Department of Health Care Services, State of California,

Respondent-Appellee.

No. 08-56061

D.C. No. 2:08-cv-03315-CAS-MAN
Central District of California, Los Angeles

ORDER

(Filed Nov. 3, 2008)

Before: REINHARDT, BERZON and M. SMITH, Circuit Judges.

The panel has voted to deny (1) appellee's petition for panel rehearing and rehearing en banc filed with the court on July 17, 2008; and (2) appellee's petition for panel rehearing and rehearing en banc filed with the court on October 8, 2008.

The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and rehearing en banc are DENIED.

IT IS SO ORDERED.

Assembly Bill No. 5

CHAPTER 3

An act to amend Section 95004 of the Government Code, and to amend Sections 4640.6, 4643, 4648.4, 4681.3, 4681.5, 4691.6, 4781.6, and 4783 of, and to add Sections 4681.6, 4689.8, 4691.9, 14041.1, 14105.19, and 14166.245 to, the Welfare and Institutions Code, relating to health, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor February 16, 2008.
Filed with Secretary of State February 16, 2008.]

LEGISLATIVE COUNSEL'S DIGEST

AB 5, Committee on Budget. Public health programs.

Under existing law, the State Department of Developmental Services provides funding for regional centers for the provision or purchase of services and supports to persons with developmental disabilities. Existing law prescribes a specified ratio for regional center service coordinator to consumer, which is in effect until June 30, 2008.

This bill would extend indefinitely the effective date of this ratio.

Existing law provides for the assessment of certain individuals for whom benefits are provided by regional centers. Existing law provides that if assessment is needed, prior to July 1, 2008, the assessment shall be performed within 120 days following

initial intake, and requires that assessments after that date shall be performed within 60 days following intake.

This bill would extend indefinitely the 120-day assessment requirement.

Existing law, with certain exceptions, for the 2007-08 fiscal year, prohibits a regional center from paying any provider of specified services a rate that is greater than the rate that is in effect on July 1, 2007, unless the increase is required by contract between the regional center and the vendor that is in effect on June 30, 2007.

This bill would extend indefinitely this prohibition with respect to the payment of rates in excess of those in effect on June 30, 2008.

Existing law provides that, during the 2007-08 fiscal year, no regional center may approve any service level for a residential service provider.

This bill would extend indefinitely this provision. It would also prohibit, commencing July 1, 2008, a regional center from negotiating rates with residential care providers, except as prescribed.

Existing law requires the State Department of Developmental Services to make payments to providers of supported living services for adults with developmental disabilities. Under existing law, the department, by July 1, 2002, is required to establish, by regulation, an equitable and cost-effective methodology for

the determination of supported living costs and a methodology of payment for these providers.

This bill would, commencing July 1, 2008, impose prescribed rate increase restrictions on reimbursement to these service providers and would also prohibit a regional center from negotiating rates with these providers, except as prescribed.

Existing law prohibits, during the 2007-08 fiscal year, the State Department of Developmental Services from establishing any permanent payment rate for a community-based day program or in-home respite care agency that has a temporary payment rate in effect on July 1, 2007, or from making other specified changes or adjustments that would result in a rate increase.

This bill would extend indefinitely this provision, and would apply it to rates in effect June 30, 2008. It would also prohibit a regional center from negotiating rates with these providers, except as prescribed.

Existing law provides that, for the 2007-08 fiscal year only, a regional center shall not expend any purchase of service funds for the startup of any new program unless the expenditure is necessary to protect the consumer's health or safety or because of other extraordinary circumstances and the department has granted prior written authorization.

This bill would extend indefinitely this prohibition.

Under existing law, the California Early Start Intervention Services Act, various state entities provide coordinated services to infants and toddlers with disabilities and their families. Existing law requires early intervention services to be provided directly to eligible infants and toddlers and their families through the regional center system and the local education system. Existing law requires that, in providing services under the act, regional centers comply with the Lanterman Developmental Disabilities Services Act, and its implementing regulations, including, but not limited to, those provisions relating to vendorization and ratesetting, except where compliance with those provisions would result in any delays in, or any cost to families for, the provision of early intervention, or otherwise conflict with the act or its implementing regulations. Existing law, until July 1, 2009, also contains family cost participation requirements for specified services obtained by regional centers for persons with developmental disabilities.

This bill would extend indefinitely the family cost participation requirements, and would also require that, subject to federal approval, in providing those early intervention services under the Lanterman Developmental Disabilities Services Act, regional centers apply the family cost participation requirements that require families of children receiving early intervention services to contribute a specified amount to the cost of those services based on family size and scaled income levels. It would also revise the

family cost participation schedule and the procedures governing how a parent may appeal a decision made by the executive director of a regional center, with respect to the amount of the parents' cost participation.

Existing law provides for the Medi-Cal program, administered by the State Department of Health Care Services, under which qualified low-income persons are provided with a variety of health services.

Existing law contains various provisions governing reimbursement rates for Medi-Cal providers.

This bill would, notwithstanding any other provision of law, and to the extent not otherwise conflicting with federal law, authorize the department to withhold, or direct the medical fiscal intermediary to withhold, payments for providers, as described, for a period of one month for a month ending prior to January 1, 2009.

Existing law creates various health programs, including the Child Health and Disability Prevention Program, the California Children's Services Program, the Genetically Handicapped Person's Program, and specified family planning programs.

This bill would, with certain exceptions, for services rendered under these programs on and after July 1, 2008, require the Director of Health Care Services to reduce provider reimbursement rates by 10%.

The bill would specify that the reductions imposed pursuant to the bill would apply only to the General Fund share of the payment, and only to payments for services from funds appropriated to the department.

Existing law establishes the Medi-Cal Hospital/Uninsured Care Demonstration Project Act, which revises hospital reimbursement methodologies under the Medi-Cal program in order to maximize the use of federal funds consistent with federal Medicaid law and stabilize the distribution of funding for hospitals that provide care to Medi-Cal beneficiaries and uninsured patients. This demonstration project provides for funding, in supplementation of Medi-Cal reimbursement, to various hospitals, including designated public hospitals, nondesignated public hospitals, and private hospitals, as defined in accordance with certain provisions relating to disproportionate share hospitals.

This bill would reduce by 10% payments for inpatient hospital services to acute care hospitals not under selective contracts with the department that are provided on and after July 1, 2008.

The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. The Governor issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on January 10, 2008.

This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on January 10, 2008, pursuant to the California Constitution.

This bill would declare that it is to take effect immediately as an urgency statute.

The People of the State of California do enact as follows:

* * *

SEC. 14. Section 14105.19 is added to the Welfare and Institutions Code, to read:

14105.19. (a) Notwithstanding any other provision of law, in order to implement changes in the level of funding for health care services, the director shall reduce provider payments as specified in this section.

(b) (1) Except as provided in subdivision (c), payments shall be reduced by 10 percent for Medi-Cal fee-for-service benefits for dates of service on and after July 1, 2008.

(2) Except as provided in subdivision (c), payments shall be reduced by 10 percent for non-Medi-Cal programs described in Article 6 (commencing with Section 124025) of Chapter 3 of Part 2 of Division 106 of the Health and Safety Code, and Section 14105.18, for dates of service on and after July 1, 2008.

(3) For managed health care plans that contract with the department pursuant to this chapter, Chapter 8 (commencing with Section 14200), and Chapter 8.75 (commencing with Section 14590), payments shall be reduced by the actuarial equivalent amount of the payment reduction specified in this subdivision pursuant to contract amendments or change orders effective on July 1, 2008.

(c) The services listed in this subdivision shall be exempt from the payment reductions specified in subdivision (b):

(1) Acute hospital inpatient services, except for payments to hospitals not under contract with the State Department of Health Care Services, as provided in Section 14166.245.

(2) Federally qualified health center services, including those facilities deemed to have federally qualified health center status pursuant to a waiver under subdivision (a) of Section 1315 of Title 42 of the United States Code.

(3) Rural health clinic services.

(4) All of the following facilities:

(A) A skilled nursing facility pursuant to subdivision (c) of Section 1250 of the Health and Safety Code, except a skilled nursing facility that is a distinct part of a general acute care hospital. For purposes of this paragraph, "distinct part" has the same meaning as defined in Section 72041 of Title 22 of the California Code of Regulations.

(B) An intermediate care facility for the developmentally disabled pursuant to subdivision (e), (g), or (h) of Section 1250 of the Health and Safety Code, or a facility providing continuous skilled nursing care to developmentally disabled individuals pursuant to the pilot project established by Section 14495.10.

(C) A subacute care unit, as defined in Section 51215.5 of Title 22 of the California Code of Regulations.

(5) Payments to facilities owned or operated by the State Department of Mental Health or the State Department of Developmental Services.

(6) Hospice.

(7) Contract services as designated by the director pursuant to subdivision (e).

(8) Payments to providers to the extent that the payments are funded by means of a certified public expenditure or an intergovernmental transfer pursuant to Section 433.51 of Title 42 of the Code of Federal Regulations.

(9) Services pursuant to local assistance contracts and interagency agreements to the extent the funding is not included in the funds appropriated to the department in the annual Budget Act.

(10) Payments to Medi-Cal managed care plans pursuant to Section 4474.5 for services to consumers transitioning from Agnews Developmental Center into Alameda, San Mateo, and Santa Clara Counties

pursuant to the Plan for the Closure of Agnews Developmental Center.

(11) Breast and cervical cancer treatment provided pursuant to Section 14007.71.

(12) The Family Planning, Access, Care, and Treatment (Family PACT) Waiver Program pursuant to Section 14105.18.

(d) Subject to the exception for services listed in subdivision (c), the payment reductions required by subdivision (b) shall apply to the services rendered by any provider who may be authorized to bill for the service, including, but not limited to, physicians, podiatrists, nurse practitioners, certified nurse midwives, nurse anesthetists, and organized outpatient clinics.

(e) Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the department may implement this section by means of a provider bulletin, or similar instruction, without taking regulatory action.

(f) The reductions described in this section shall apply only to payments for services when the General Fund share of the payment is paid with funds directly appropriated to the department in the annual Budget Act and shall not apply to payments for services paid with funds appropriated to other departments or agencies.

(g) The department shall promptly seek any necessary federal approvals for the implementation of this section.

SEC. 15. Section 14166.245 is added to the Welfare and Institutions Code, to read:

14166.245. (a) The Legislature finds and declares that the state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures to avoid reducing vital government services necessary for the protection of the health, safety, and welfare of the citizens of the State of California.

(b) Notwithstanding any other provision of law, for acute care hospitals not under contract with the State Department of Health Care Services pursuant to Article 2.6 (commencing with Section 14081) of Chapter 7 of Part 3 of Division 9, the amounts paid as interim payments for inpatient hospital services provided on and after July 1, 2008, shall be reduced by 10 percent.

(c) (1) Notwithstanding any other provision of law, for acute care hospitals not under contract with the State Department of Health Care Services, the reimbursement amount for inpatient services provided to Medi-Cal recipients for dates of service on and after July 1, 2008, shall not exceed the amount determined pursuant to paragraph (3).

(2) For purposes of this subdivision, the reimbursement for inpatient services includes the amounts

paid for all categories of inpatient services allowable by Medi-Cal. The reimbursement includes the amounts paid for routine services, together with all related ancillary services.

(3) When calculating a hospital's cost report settlement for a hospital's fiscal period that includes any dates of service on and after July 1, 2008, the settlement for dates of service on and after July 1, 2008, shall be limited to 90 percent of the hospital's audited allowable cost per day for those services multiplied by the number of Medi-Cal covered inpatient days in the hospital's fiscal year on or after July 1, 2008.

(d) Hospitals that participate in the Selective Provider Contracting Program pursuant to Article 2.6 (commencing with Section 14081) and designated public hospitals under Section 14166.1, except Los Angeles County Martin Luther King, Jr./Charles R. Drew Medical Center and Tuolumne General Hospital, shall be exempt from the 10 percent reduction required by this section.

(e) Notwithstanding the rulemaking provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the director may implement subdivision (b) by means of a provider bulletin, or other similar instruction, without taking regulatory action.

(f) The director shall promptly seek all necessary federal approvals in order to implement this

section, including necessary amendments to the state plan.

SEC. 16. This act addresses the fiscal emergency declared by the Governor by proclamation on January 10, 2008, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.

SEC. 17. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to make statutory changes needed to implement cost containment measures affecting health services, at the earliest possible time, it is necessary that this act take effect immediately.

State of California – Health and Human Services Agency
Department of Health Care Services
[Address Omitted In Printing]

[LOGO]	[LOGO]
SANDRA SHEWRY	ARNOLD SCHWARZENEGGER
Director	*Governor*

SEP 30 2008

Ms. Gloria Nagle
Associate Regional Administrator
Centers for Medicare & Medicaid Services
Division of Medicaid and Children's Health
90 7th Street, Suite 5-300 (5W)
San Francisco, CA 94103-6707

Dear Ms. ~~Nagle~~ Gloria:

Re: STATE PLAN AMENDMENT 08-009

The California Department of Health Care Services (DHCS) is submitting State Plan Amendment (SPA) 08-009, which adds provisions mandated by Assembly Bill x3 5 and Assembly Bill 1183 (Statutes of 2008).

This legislation requires DHCS to reduce Medi-Cal payments by ten percent for all Medi-Cal providers, effective July 1, 2008, through and including February 28, 2009, with the exception of the following:

- Acute hospital inpatient services provided under contract with DHCS.
- Federally Qualified Health Center services.
- Rural Health Clinic services.

- Skilled Nursing Facilities (SNFs) as defined in subdivision (c) of Section 1250 of the California Health and Safety Code, except a SNF that is a distinct part of a general acute care hospital.
- Intermediate Care Facilities for the Developmentally Disabled (ICF-DD) pursuant to subdivision (e), (g), or (h) of Section 1250 of the Health and Safety Code, or a facility providing continuous skilled nursing care to developmentally disabled individuals pursuant to the pilot project established by Section 14495.10 of the California Welfare and Institutions Code.
- Subacute Care Units as defined in Section 51215.5 of Title 22 of the California Code of Regulations.
- Payments to facilities owned or operated by the California Department of Mental Health or Department of Developmental Services.
- Hospice services.
- Contract services as designated by the director.
- Payments to providers to the extent that the payments are funded by means of a certified public expenditure or an intergovernmental transfer pursuant to Section 433.51 of Title 42 of the Code of Federal Regulations (CFR).
- Breast and cervical cancer treatment provided pursuant to Section 14007.71 of the Welfare and Institutions Code.

- Family Planning, Access, Care, and Treatment (Family PACT) Waiver Program.
- Small and rural hospitals, as defined in Section 124840 of the California Health and Safety Code, for dates of service on or after November 1, 2008.

Beginning March 1, 2009, the payment reductions described above will be set at one percent, except as follows:

- Payments to the following providers will be reduced by five percent beginning March 1, 2009: specified intermediate care facilities, SNFs that are distinct parts of general acute care hospitals, subacute care units that are distinct parts of general acute care hospitals, adult day health care centers, and pharmacies.
- On and after October 1, 2008, payments to non-contract hospitals will be subject to reductions specified in Welfare and Institutions Code section 141666.245, as amended in Assembly Bill 1183. A separate State Plan Amendment will be submitted to encompass these provisions.

At all times, payments to managed health care plans that contract with DHCS will be reduced by the actuarial equivalent of the reductions made to fee-for-service payments, as applicable.

The enclosed SPA affects the following pages of the State Plan:

- Attachment 4.19-A:
  - amends paragraph A. on page 2 to reference new paragraph M.
  - adds new paragraph M on new page 3.2.
  - adds new paragraph (d) on page 5.
- Attachment 4.19-B:
  - adds paragraphs (6), (7), (8) and (9) on pages 3 and 3.1.
  - adds paragraphs A1, A2, A3, B1, B2 and B3 on pages 1 and 2 of Supplement B.
- Attachment 4.19-D: adds new paragraph K. on page 15.4. and adds new page 15.4a

DHCS has complied with the applicable requirements of 42 C.F.R. Part 447. Specifically, DHCS issued a public notice as required by section 447.205 on March 28, 2008. Additionally, DHCS has determined that payments will continue to comply with any upper spending limits contained in Part 447 that were adopted to implement the "efficiency, economy, and quality of care" provision of title 42, United States Code, section 1396a(a)(30)(A). Beneficiaries will continue to have access to covered services as required by Part 447.

In addition, as CMS is aware, lawsuits were filed challenging the payment reductions provided for in these state plan amendments. The Los Angeles

County Superior Court denied the plaintiffs' request for a preliminary injunction in one case and the plaintiffs have appealed. In another case, the United States District Court for the Central District issued a preliminary injunction requiring DHCS to refrain from implementing the ten percent reduction required in Assembly Bill X3 5 with respect to payments to physicians, dentists, optometrists, adult day health care centers, clinics, and payments to pharmacies for drugs for dates of service on or after August 18, 2008.

DHCS is complying with the preliminary injunction, but has appealed. DHCS believes the injunction should be overturned because the court failed to consider in its ruling evidence showing that DHCS had analyzed the impact of the ten percent reduction and reasonably concluded that the reduction for these services would comply with federal Medicaid law.

However, if DHCS is not successful in overturning that injunction or if another court order is issued barring some of the reductions, DHCS may be unable to implement some of the payment reductions contained in these state plan amendments. Because of the possible impact of pending litigation on these payment reductions, we are seeking CMS guidance as to whether DHCS needs to include language with these amendments to the State Plan to clarify that these payment reductions are subject to court orders that preclude DHCS from implementation.

If you have questions or concerns regarding the proposed provisions, please contact Mr. Irvin B. White, Jr., Chief of the Medi-Cal Benefits, Waivers Analysis and Rates Division, at (916) 657-9600.

Sincerely,

/s/ Stan Rosenstein
Stan Rosenstein
Chief Deputy Director
Health Care Programs

cc: Toby Douglas
Deputy Director
Health Care Policy
1501 Capitol Avenue, MS 0000

Irvin B. White, Jr. Chief
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Nancy Hutchison, Chief
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DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION

FORM APPROVED
OMB NO. 0938-0193

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL	1. TRANSMITTAL NUMBER: 08-009	2. STATE
FOR: HEALTH CARE FINANCING ADMINISTRATION	3. PROGRAM IDENTIFICATION: TITLE XIX OF THE SOCIAL SECURITY ACT (MEDICAID)	
TO: REGIONAL ADMINISTRATOR HEALTH CARE FINANCING ADMINISTRATION DEPARTMENT OF HEALTH AND HUMAN SERVICES	4. PROPOSED EFFECTIVE DATE July 1, 2008	

73a

5. TYPE OF PLAN MATERIAL *(Check One)*:

☐ NEW STATE PLAN ☐ AMENDMENT TO BE CONSIDERED AS NEW PLAN
X AMENDMENT

COMPLETE BLOCKS 6 THRU 10 IF THIS IS AN AMENDMENT
(Separate Transmittal for each amendment)

6. FEDERAL STATUTE/REGULATION CITATION:	7. FEDERAL BUDGET IMPACT: a. FFY 07-08(3 mos) (-$107.4 million) b. FFY 08-09 (-$527.3 million)
8. PAGE NUMBER OF THE PLAN SECTION OR ATTACHMENT: Attachment 4.19-A: amend pages 2 and 5 and add page 3.2 Attachment 4.19-B: amend page 3 and add page 3.1 Supplement 2 to Attachment 4.19-B: amend pages 1 and 2 Attachment 4.19-D: amend page 15.4 and add page 15.4a	9. PAGE NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT *(If Applicable)*: Attachment 4.19-A, pages 2, and 5 Attachment 4.19-B, page 3 Supplement 2 to Attachment 4.19-B, pages 1 and 2 Attachment 4.19-D, page 15.4

10. SUBJECT OF AMENDMENT:

IMPLEMENT 10% PROVIDER PAYMENT REDUCTION FOR SPECIFIED PROVIDERS AND SERVICES

11. GOVERNOR'S REVIEW *(Check One)*:

☐ GOVERNOR'S OFFICE REPORTED NO COMMENT
☐ COMMENTS OF GOVERNOR'S OFFICE ENCLOSED
☐ NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL
X OTHER, AS SPECIFIED: Governor's Office does not wish to Review State Plan Amendments

12. SIGNATURE OF STATE AGENCY OFFICIAL: /s/ Stan Rosenstein 9/30/08	16. RETURN TO:
13. TYPED NAME: Stan Rosenstein	
14. TITLE: Chief Deputy Director, Health Care Programs	
15. DATE SUBMITTED:	

FOR REGIONAL OFFICE USE ONLY	
17. DATE RECEIVED:	18. DATE APPROVED:
PLAN APPROVED – ONE COPY ATTACHED	
19. EFFECTIVE DATE OF APPROVED MATERIAL:	20. SIGNATURE OF REGIONAL OFFICIAL:
21. TYPED NAME:	22. TITLE:
23. REMARKS:	

SPA Impact Form

State/Title/Plan Number: California/Title XIX/ 08-009

Federal Fiscal Impact: Estimated reduction in FFP of $107.4 million in FFY 2007-08 (3 months) and $527.3 million in FFY 2008-09

Number of People Affected by Enhanced Coverage, Benefits or Retained Eligibility: N/A

Number of Potential Newly Eligible People: N/A or

Eligibility. Simplification: No

Number of People Losing Medicaid Eligibility: N/A

Reduces Benefits: No

Provider Payment Increase: No

Delivery System Innovation: No
(Examples: adding new provider types to provide a covered service, managed care delivery systems or other similar type plans)

Comments/Remarks:

This SPA will provide authority for the following payment reductions to specified providers and programs:

- A ten (10) percent reduction effective for dates of service July 1, 2008 through February 28, 2009
- A one (1) or five (5) percent reduction, effective for dates of service on or after March 1, 2009

DHS Contact:
Linda Machado/Medi-Cal Benefits, Waivers Analysis and Rates Division (916) 552-9638

Date: September 30, 2008

[Attachment 4.19-A Page 2]

II. REIMBURSEMENT LIMITS

A. Reimbursement for in-state hospital inpatient services provided to Medi-Cal program beneficiaries for provider fiscal periods beginning on or after May 23, 1992 and not fully covered by a negotiated contract as allowed in the Welfare and Institution Code (W&I) Section 14081, shall be the lowest of the following four items except as stated in B., D., F., G., H., and M., for each provider:

1) Customary charges;

2) Allowable costs determined by the Department, in accordance with applicable Medicare standards and principles of cost based reimbursement, as specified in applicable parts of 42 Code of Federal Regulations (CFR), Part 413 and HCFA Publication 15-1.

3) All-inclusive rate per discharge limitation (ARPDL). This is detailed in Section V. of this Plan.

4) The peer grouping rate per discharge limitation (PGRPDL). This is detailed in Section IX. of this Plan.

B. The following adjustment should be made to items 1) through 4) above:

1) Providers shall also be reimbursed for disproportionate share payments if applicable.

2) The least of the four items listed in A. 1)-4) above shall be reduced by the amount of TPL.

C. Amounts determined under 3) or 4) above may be increased only by an AA or formal appeal.

D. New hospitals and rural hospitals shall be exempt from the provisions of this part of the Plan relating to the MIRL and PIRL. New and rural hospitals shall be reimbursed in accordance with the lessor of A. 1) or A. 2) above, and subject to any limitations provided for under federal law and/or regulation.

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Supersedes
TN. No. 92-07 Approval Date _____

Effective Date _____

[Attachment 4.19-A Page 3.2]

M. (1) In determining reimbursement for a final cost report settlement for a hospital's fiscal period that includes any dates of service on or after July 1, 2008, the reimbursement limitation under Paragraph II.A.2 for services on or after that date, shall be 90 percent of allowable cost determined under that paragraph, multiplied by the number of Medi-Cal covered inpatient days on or after July 1, 2008, within the hospital's fiscal period.

(2) The payment limitation provided in paragraph (1) above will apply to small and rural hospitals, as defined in Section 124840 of the California Health and Safety Code, for dates of service July 1, 2008, through and including October 31, 2008. For services provided on or after November 1, 2008, the payment limitation set forth in paragraph (1) above will not apply.

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[Attachment 4.19-A Page 5]

provider for which the rate is needed, the Department will base an interim rate of payment on the reimbursable costs and customary charges of the comparable provider.

2. If there are no substantially comparable providers from whom data are available, the Department will determine an interim rate of payment based on the budgeted or projected reimbursable costs and customary charges of the provider.

3. Under either method, the Department will review the provider's cost and charge experience and adjust the interim rate of payment in line with the provider's cost and charge experience.

4. The Department may prohibit increases in the accommodation rates, as defined in applicable parts of 42 CFR, Part 413 and HCFA Publication 15-1, charged by the provider if the Department projects that such increases would cause their interim payments to exceed the PIRL.

5. Newly established providers may appeal their interim rate if it is based upon the criteria in A. 2) (c) 1. through 4., in accordance with the AAR procedures specified in Section VI. of this Plan.

(d) For dates of service on or after July 1, 2008, interim payments that would otherwise be made based on the interim rate established in accordance with this paragraph will be reduced by ten percent.

IV. OVERPAYMENTS

A. Interim payment rate adjustments and recovery of overpayments to providers shall be made at tentative or final settlement based upon the application of this plan.

1) Such overpayments shall be collected and such interim payment rates shall be adjusted whether or not appeals of any audit, MIRL or PIRL for the current or any prior fiscal period have been filed by the provider.

2) Interim payment rates calculated after May 23, 1992 for Sections I. through XIII. of this Plan and applied to services provided after May

23, 1992, shall comply with Sections III. and IV. of this Plan even if the actual settlement upon which the new interim rate is based, is not subject to the Plan.

TN No. 08-009
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TN. No. 92-07

Approval Date _____

Effective Date _____

[Attachment 4.19-B Page 3]

STATE PLAN UNDER TITLE XIX OF SOCIAL SECURITY ACT STATE: *California*

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(4) No modification in method or amount of payment will be made under this paragraph which does not meet all applicable requirements of 42 CFR Part 447. An analysis of provider participation, and the expected impact of any proposed modification on provider participation, will be completed before any modification of payments is made under this paragraph. Where necessary, adjustments to proposed or implemented modifications in method or amount of payment made under this paragraph will be made, to assure compliance with 42 CFR 447.204.

(5) Before any of the above actions are taken, the director shall consult with representatives of concerned provider groups.

(6) For dates of service July 1, 2008, through and including February 28, 2009, reimbursement otherwise payable in accordance with the methods and standards described in this Attachment will be reduced by ten percent. The provider types and services specified below are exempt from the ten percent reduction:

- Federally qualified health center services, including those facilities deemed to have federally qualified health center status pursuant to a waiver under subdivision (a) of Section 1315 of Title 42 of the United States Code.
- Rural health clinic services.
- Payments to facilities owned or operated by the California Department of Mental Health or California Department of Developmental Services.
- Payments to providers to the extent that the payments are funded by means of a certified public expenditure or intergovernmental transfer pursuant to Section 433.51 of Title 42 of the Code of Federal Regulations.
- Payments for Medicare Part A Deductible/ Coinsurance.
- Breast and cervical cancer treatment services.

- The Family Planning, Access, Care, and Treatment (Family PACT) Waiver Program services.

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[Attachment 4.19-B Page 3.1]

STATE PLAN UNDER TITLE XIX OF
SOCIAL SECURITY ACT STATE: *California*

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(7) For dates of service on or after March 1, 2009, reimbursement otherwise payable in accordance with the methods and standards described in this Attachment will be reduced by one percent. The provider types and services specified below are exempt from the one percent reduction:

- Federally qualified health center services, including those facilities deemed to have federally qualified health center status pursuant to a waiver under subdivision (a) of Section 1315 of Title 42 of the Unites States Code..
- Rural health clinic services.
- Payments to facilities owned or operated by the California Department of Mental Health or California Department of Developmental Services.
- Payments to providers to the extent that the payments are funded by means of a certified public expenditure or intergovernmental

transfer pursuant to Section 433.51 of Title 42 of the Code of Federal Regulations.

- Payments for Medicare Part A Deductible/ Coinsurance.
- Breast and cervical cancer treatment services.
- The Family Planning, Access, Care, and Treatment (Family PACT) Waiver Program services.
- Pharmacy and Adult Day Health Care Centers, which are subject to the five percent reduction described in paragraph (9) below.

(8) The payment reductions provided in paragraphs (6) and (7) above will apply to small and rural hospitals, as defined in Section 124840 of California's Health and Safety Code, for dates of service July 1, 2008, through and including October 31, 2008. For services provided on or after November 1, 2008, the payment reduction set forth in paragraphs (6) and (7) above will not apply.

(9) For dates of service on or after March 1, 2009, reimbursement otherwise payable in accordance with the methods and standards described in this Attachment will be reduced by five percent for pharmacies (including, but not limited to, payments for drug products and professional fees) and Adult Day Health Care Centers.

[Supplement 2 to ATTACHMENT 4.19-B Page 1]

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT STATE: California

METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES-PRESCRIBED DRUGS

PAYMENT METHODOLOGY FOR PRESCRIPTION DRUGS

The policy of the State Agency is that reimbursement for Pharmaceutical Services and Prescribed Drugs, as one category of health care or service from among those listed in Section 1905(a) of the Social Security Act that are included in the program under the plan, will be at the provider pharmacy's current charges to the general public, up to the State Agency's limits. The price providers charge to the program shall not exceed that charged to the general public. The pharmacist, to the extent permitted by law, shall dispense the lowest cost, therapeutically equivalent drug product that the pharmacy has in stock, which meets the medical needs of the beneficiary.

The methodology utilized by the State Agency, in compliance with 42 C.F.R. §§ 447.331 and 447.332, in establishing payment rates for Pharmaceutical Services (pharmacy dispensing fees) and Prescribed Drugs (dispensed drug products) to implement the policy is as follows:

A.1. The method used to establish maximum *drug product payments* is that payments for drugs dispensed by pharmacists shall consist of the

state's Estimated Acquisition Cost (EAC) of the drug product dispensed plus a dispensing fee that is added to the drug product payment (see paragraph B below). The EAC is the lowest of the Average Wholesale Price (AWP) minus 17 percent, the Maximum Allowable Ingredient Cost (MAIC); the federal upper limit of reimbursement for listed multiple source drugs (called "Federal Upper Limit," or FUL), or the charges to the general public.

2. The amount of payment for dispensed drug products as described in paragraph A.1 above will be reduced by ten percent effective July 1, 2008, through and including February 28, 2009.

3. The amount of payment for dispensed drug products as described in paragraph A.1 and provided on or after March 1, 2009, will be reduced by five percent.

TN NO. 08-009
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[Supplement 2 to ATTACHMENT 4.19-B Page 2]

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT STATE: California

METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES-PRESCRIBED DRUGS

B.1. The professional fee for dispensing is seven dollars and 25 cents ($7.25) per dispensed

prescription. The professional fee for legend drugs dispensed to a beneficiary residing in a skilled nursing facility or intermediate care facility is eight dollars ($8.00) per dispensed prescription. For the purposes of this paragraph B, "skilled nursing facility" and "intermediate care facility" mean as defined in Division 5 (commencing with Section 70001) of Title 22 of the California Code of Regulations.

2. The amount of payment for the professional fee as described in paragraph B.1 above will be reduced by ten percent effective July 1, 2008, through and including February 28, 2009.

3. The amount of payment for the professional fee as described in paragraph B.1 and provided on or after March 1, 2009, will be reduced by five percent.

C. For purposes of this Supplement 2, the following definitions apply:

- "Average wholesale price" means the price for a drug product listed in the department's primary price reference source.
- "Direct price" means the price for a drug product purchased by a pharmacy directly from a drug manufacturer listed in the department's primary reference source.
- "Federal upper limit" means the maximum per unit reimbursement when established by the Centers for Medicare and Medicaid Services and published by the department in Medi-Cal pharmacy provider bulletins and manuals.

- "Generically equivalent drugs" means drug products with the same active chemical ingredients of the same strength, quantity, and dosage

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[Attachment 4.19-D Page 15.4]

2. A skilled nursing facility that is a distinct part of a general acute care hospital as defined in Section 72041 of Title 22 of the California Code of Regulations.

3. A subacute care program, as described in Section 14132.25 or subacute care unit, as described in Sections 51215.5 and 51215.8 of Title 22 of the California Code of Regulations.

4. An adult day health care center.

K. 1. For dates of service after July 1, 2008, through and including February 28, 2009, the prospective rate otherwise established in accordance within this Part IV will be reduced by ten percent with the exception of the amounts paid to the following provider types:

- Freestanding Nursing Facilities Level B (NF-Bs)
- Freestanding Subacute Units and Subacute Units that are parts of NF-Bs

- Intermediate Care Facilities for the Developmentally Disabled (ICF-DD)
- ICF-DDs (Habilitative)
- ICF-DDs (Nursing)
- ICF-DDs Continuous Nursing Pilot Program
- Hospice services

2. For dates of service on or after March 1, 2009, the prospective rate otherwise established in accordance within this Part IV will be reduced by five percent with the exception of the amounts paid to the following provider types:
   - Freestanding Nursing Facilities Level B (NF-Bs)
   - Freestanding Subacute Units and Subacute Units that are parts of NF-Bs
   - Intermediate Care Facilities for the Developmentally Disabled (ICF-DD)
   - ICF-DDs (Habilitative)
   - ICF-DDs (Nursing)
   - ICF-DDs Continuous Nursing Pilot Program
   - Hospice Services
3. The payment reductions provided in paragraph (1) above shall apply to small and rural hospitals, as defined in Section 124840 of California's Health and Safety Code, for dates of service July 1, 2008, through and including October 31, 2008. For services provided on or

after November 1, 2008, the payment reduction in paragraph (1) above shall not apply.

TN. No. 08-009
Supersedes
TN. No. 03-041 Approval Date _____

Effective Date _____

[Attachment 4.19-D Page 15.4a]

V. DETERMINATION OF RATES FOR NEW OR REVISED PROGRAMS

A. When State adopts a new service or significantly revises an existing service, the rate of reimbursement shall be based upon comparable and appropriate cost information which is available. Comparable rate and cost data shall be selected and combined in such a manner that the rate is reasonably expected to approximate median audited facility costs, had accurate cost reports been available for the particular class of facility. Such factors as mandated staffing levels and salary levels in comparable facilities shall be taken into account. This method of rate-setting shall ordinarily be relied upon to set rates only until such time as accurate cost reports which are representative of ongoing operations become available.

B. When it is determined that cost report data from a class of facilities is not reliable for rate-setting purposes due to inaccuracies or reporting errors, a random sample of such facilities shall be selected for audit and the

resulting audited costs shall be used for the rate study. After five years from the end of the fiscal year in which a facility begins participating in a program for Medi-Cal reimbursement, the reimbursement rate methodology will either revert to the provisions described in Section I through IV of Attachment 4.19-D or be subject to new provisions as described in a State Plan Amendment.

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OPPOSITION BRIEF

(2)

No. 08-1223

Supreme Court, U.S.
FILED
MAY 22 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DAVID MAXWELL-JOLLY, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES,

Petitioner,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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May 22, 2009

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BRIEF IN OPPOSITION

INTRODUCTION

This petition should be denied. The Ninth Circuit below, in an interlocutory order, judgment and opinion filed July 11, 2008 (to which the September 17, 2008 Opinion, reprinted by petitioner at Pet. App. 1a-36a, simply "more fully sets forth the rationale," *id.* at 10a), applied settled law to hold that respondents may maintain a valid cause of action for injunctive relief to prevent injury from a state law which is contrary to, and hence preempted under the Supremacy Clause by, a federal statute.[1]

---

[1] Oddly, petitioner has not sought *certiorari* from the interlocutory order and judgment of July 11, 2008 of the Ninth Circuit in this case below, but has instead petitioned the Court for relief solely from the further opinion filed September 17, 2008—which is not itself an order or judgment from which *certiorari* could lie in the case at bar. Nor is the September 17, 2008 Opinion a new or dispositive *de facto* judgment or order which changed or amended anything in the already-filed July 11, 2008 dispositive order.

The Opinion states that it is only an opinion:

> We heard argument on July 11, 2008, and issued an order the same day reversing the district court's decision and remanding for consideration of the merits of [respondents'] motion for preliminary injunction. *This opinion more fully sets forth the rationale of our July 11 order.*

Pet. App. 9a-10a (internal footnote omitted, emphasis added). Petitioner has also, inexplicably, failed to include the court of appeals' dispositive order of July 11, 2008, in his Appendix—thus leaving the Court, in effect, no dispositive order or judgment to review.

This holding is consistent with the holdings of every other circuit and with the rulings and conduct of this Court, which for more than a century have permitted persons to bring and maintain a cause of action for injunctive or declaratory relief to prevent injury from state action which is preempted, under the Supremacy Clause, by contrary federal law.

Neither the Ninth Circuit's order nor its subsequent September 17, 2008 Opinion ruled on the merits of respondents' preemption claim. Pet. App. 36a. On remand from the Ninth Circuit's July 11, 2008 order, the district court did, on August 18, 2008, and on November 17, 2008, preliminarily enjoin as preempted petitioner's implementation of the state law—known as AB 5—that cut reimbursement rates for providers of services under the California Medicaid program (Medi-Cal) with respect to doctors, dentists, prescription drugs, adult day health care centers, clinics, home health agencies, and non-emergency medical transporters in the Medi-Cal fee-for-service program.

Petitioner has appealed the August 18, 2008, and the November 17, 2008, preliminary injunctions of the district court to the Ninth Circuit. Those appeals (Nos. 08-56422 and 08-57016) were orally argued and submitted on February 18, 2009. Subsequently, also, AB 5 was repealed in respect to services furnished on or after March 1, 2009. Review of the September 17, 2008 Opinion is thus even more inappropriate than is review by this Court of the average interlocutory decision.

STATEMENT

1. Statutory Framework

a. Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (the "Medicaid Act"), is a cooperative federal-state program that provides federal financial assistance to participating States to enable them to provide medical treatment for the poor, elderly and disabled.

A State's participation in Medicaid is voluntary. However, if a State chooses to participate, then it must comply with the Medicaid Act and its implementing regulations. To receive federal funds, States are required to establish and administer their Medicaid programs through individual "State plans for medical assistance" approved by the federal Secretary of Health and Human Services (HHS). 42 U.S.C. § 1396.

The Medicaid Act provides specific requirements for state plans and reimbursement rates, *see* 42 U.S.C. § 1396a(a)(1)-(71), including those set out in Section 1396a(a)(30)(A) (hereinafter "Section 30A"), the specific provision at issue in this case. Section 30A requires that a state plan establish reimbursement rates for health care providers that are both consistent with high quality medical care (the "quality of care" provision) and sufficient to enlist enough providers to ensure that medical services are as available to recipients as is generally available to the public in the same geographical area (the "equal access" provision).

b. On February 16, 2008, the California Legislature enacted Assembly Bill X3 5 ("AB 5") in a special session. Pet. App. 54a-66a. AB 5 makes the legislative findings that the "state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures"; that AB 5 was enacted to "address[ ] the fiscal emergency declared by the Governor" and to "implement cost containment measures affecting health services, at the earliest possible time." Pet. App. 64a-66a (AB 5 §§ 15-17).

Section 14 of AB 5 added Section 14105.19 to the Welfare and Institutions Code, which instructed petitioner Director of the Department of Health Care Services, as the state agency which administers California's state Medicaid plan, to cut by ten percent reimbursement rates under the Medi-Cal fee-for-service program to physicians, dentists, pharmacies, adult day health care centers, clinics, and other providers. *See* Pet. App. 60a (codified as Cal. Welf. & Inst. Code § 14105.19(b)(1) (2008)). AB 5 provided that the ten percent rate cuts were to go into effect on July 1, 2008. *Ibid.*

The California legislature subsequently enacted Assembly Bill 1183 ("AB 1183"), on September 30, 2008. Section 44 of AB 1183 amended Section 14105.19 to make the rate reductions of AB 5, excluding non-contract hospitals, expire on February 28, 2009. Cal. Welf. & Inst. Code § 14105.19(b) (2009). Section 45 of AB 1183 added a new Section 14105.191 (2009) that, effective March 1, 2009, required a five percent rate cut for certain Medi-Cal fee-for-services

payments and benefits, including pharmacies and adult day health care centers, and a one percent rate reduction for all other fee-for-service benefits.[2]

2. Factual Background

a. Respondents are two Medi-Cal beneficiaries, three Medi-Cal pharmacies with more than 5,000 Medi-Cal beneficiaries, and an independent living center and Gray Panther groups with more than 5,000 clients or members who are Medi-Cal beneficiaries, in the Medi-Cal fee-for-service program. On April 22, 2008, they sued petitioner Sandra Shewry, Director of the California Department of Health Care Services, in California state court to prevent the implementation of AB 5.[3] Respondents alleged that the action of the State to enact and implement the ten percent payment reduction of AB 5 was void, contrary to and preempted under the Supremacy Clause by the federal quality of services and equal access clauses of Section 30A, due to the fact that the Legislature had enacted AB 5

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[2] The cuts required by AB 1183 are not being challenged in this action, and separate actions are currently pending against petitioner challenging the cuts imposed in AB 1183. *See, e.g., Managed Pharmacy Care et al. v. Maxwell-Jolly*, No. 2:08-cv-03315 (C.D. Cal.), *appeal pending*, No. 09-55692 (9th Cir. filed May 7, 2009); *California Pharmacists Ass'n et al. v. Maxwell-Jolly*, No. 2:09-cv-00722 (C.D. Cal.), *stay pending appeal granted*, No. 09-55365, 2009 WL 975458 (9th Cir. Apr. 6, 2009), *pet. for reh'g en banc filed* (Apr. 20, 2009).

[3] David Maxwell-Jolly has since succeeded Sandra Shewry as the Director.

without considering—as required by Section 30A—the relevant factors of whether providers could sustain the payment reduction without loss of quality of services and equal access of beneficiaries to quality services; so that by such violation AB 5 was contrary to, and hence preempted under the Supremacy Clause, by Section 30A; and that irreparable injury in the form of reduction and denial of access to services to Medi-Cal beneficiaries (including the respondents Medi-Cal beneficiaries and the 10,000-plus Medi-Cal beneficiaries who are patients and clients of the other respondents in the Medi-Cal fee-for-service program) would result. Pet. App. 6a-7a.

Respondents also alleged that, prior to the enactment of AB 5, a substantial percentage of medical care providers, including 45% of primary care providers and 50% of specialists, were unwilling to participate in the Medi-Cal program because of low reimbursement rates; 90% of dentists refused to accept Medi-Cal patients; and Medi-Cal's reimbursement rates for prescription drugs only gave pharmacies earnings of less than a ten percent net profit. Pet. App. 6a. By reducing reimbursement rates further, respondents asserted that AB 5 would cause additional primary care physicians, specialists, dentists, and pharmacies to opt-out of the Medi-Cal program, and force existing providers to reduce services. Pet. App. 7a. As a result, Medi-Cal recipients would thereby be denied quality medical services and access to quality medical services in violation of Section 30A.

Respondents sought a writ of mandate or injunction to prohibit the Director of the Department of Health Care Services from implementing AB 5.

b. On May 19, 2008, petitioner removed respondents' suit from state to federal court. On June 25, 2008, the district court denied respondents' motion for injunctive relief.

In reaching its decision, although the district court acknowledged that respondents filed suit under the Supremacy Clause, the court relied heavily on a case brought under 42 U.S.C. § 1983, *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005). In *Sanchez*, the court of appeals held that Section 30A does not "create an individual right that either Medicaid recipients or providers would be able to enforce under § 1983." *Id.* at 1062. The district court focused on *Sanchez* and reasoned that the Supremacy Clause "is not a source of any federal rights." Pet. App. 50a (citation omitted).

The district court also rejected respondents' argument that they were entitled to seek prospective injunctive relief on the basis of federal preemption pursuant to *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Pet. App. 46a-48a.

c. Respondents appealed. The Ninth Circuit heard oral argument on July 11, 2008 and issued an order on July 11, 2008, reversing the district court and remanding for consideration of the merits of

respondents' motion for preliminary injunction. Pet. App. 9a-10a.[4]

Then on September 17, 2008, after the district court on remand had already, on August 18, 2008, issued its first preliminary injunction in this case, the Ninth Circuit filed a further opinion—captioned as an "OPINION" and not as an order—which stated: "This opinion more fully sets forth the rationale for our July 11 order." Pet. App. 1a-36a; Pet. App. 10a. This further opinion did not change or amend the dispositive July 11, 2008 order of the Ninth Circuit in this case, in any respect.

d. In the further opinion filed September 17, 2008, the Ninth Circuit stated that "[t]he Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met." The court cited in detail the numerous cases holding that claims for injunctive relief based on federal preemption may be brought absent any express right or cause of action. Pet. App. 11a-18a (citing, *inter alia*, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); and *Shaw*).

The Ninth Circuit also rejected petitioner's argument that a claim of preemption under a federal

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[4] No petition to the Court for *certiorari* has been filed in respect to this order of July 11, 2008. The time allowed for filing such a petition has expired.

statute enacted pursuant to Congress's spending power, like the Medicaid Act, should be treated differently. Pet. App. 20a-26a. The Ninth Circuit noted that this Court and other circuits that have addressed the argument flatly rejected it. *Ibid.*

Petitioner's petition for rehearing and rehearing *en banc* were denied without recorded dissent. Pet. App. 52a-53a.

e. On remand to the district court, a preliminary injunction was issued on August 18, 2008, to enjoin petitioner from implementing the AB 5 payment cuts with respect to doctors, dentists, prescription drugs, adult day health care centers, and clinics.

The district court found that respondents demonstrated a likelihood of success on the merits because the Legislature enacted the rate reduction without any consideration of the relevant factors required by Section 30A to be considered—efficiency, economy, quality of care, and equality of access, as well as the effect of providers' costs on those relevant factors—and failed to show any justification other than purely budgetary concerns for rates that substantially deviate from the providers' costs. Dt. Ct. Dkt. 121 at 8-10. Also, it found that respondents demonstrated irreparable harm resulting from implementation of AB 5 because the cuts would cause "pharmacies to stop, or at least limit, dispensing prescription medications to Medi-Cal beneficiaries," would cause doctors and other service providers (who

had not received a rate increase since 2001) to "turn away" new Medi-Cal patients, and force adult day health care centers to close. *Id.* at 15, 16-17, 18.

Weighing the balance of the hardships and the public interest, the district court concluded that the "significant threat to the health of Medi-Cal recipients" that "reducing payments to health-care service providers will likely cause" outweighed any expected fiscal savings, which the district court noted were unlikely to materialize because "many Medi-Cal beneficiaries will turn to more costly forms of medical care, such as emergency room care." *Id.* at 20 & n.14.

On November 17, 2008, the district court issued a similar preliminary injunction for providers of non-emergency medical transportation services and providers of home health services in the Medi-Cal fee-for-service program.

The district court again found respondents had shown a likelihood of success on the merits of their claim that petitioner had acted contrary to Section 30A. Dt. Ct. Dkt. 238 at 5-11.

The district court also found that the ten percent payment reduction of AB 5 had or would force medical transportation services and home health services providers to reduce the geographic area they are able to serve, to decline to take new Medi-Cal patients, and, in some cases, to cease furnishing services to existing Medi-Cal patients and close their business altogether. *Id.* at 11-12. This curtailment of services had "already prevented altogether some

Medi-Cal beneficiaries from obtaining needed [medical] services," *id.* at 13, and forced others to enter nursing homes, *ibid.*

f. Petitioner appealed the district court's August 18 and November 17 preliminary injunctions. These appeals were orally argued and submitted on February 18, 2009, and are currently pending.

REASONS THE PETITION SHOULD BE DENIED

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE TO ADDRESS THE NINTH CIRCUIT'S INTERLOCUTORY RULING BECAUSE OF EVENTS OCCURRING SUBSEQUENT TO THE COURT OF APPEALS' DECISION

This case is not an appropriate vehicle to address any legal questions for the simple reason that the September 17, 2008 Opinion was plainly interlocutory and subsequent appeals in the Ninth Circuit in this action, currently pending after briefing and oral argument, could resolve the controversy in petitioner's favor.

The ruling petitioner seeks to review is interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for the denial of *certiorari*. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *accord Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993)

(opinion of Scalia, J., respecting the denial of *certiorari*). The Ninth Circuit in its September 17, 2008 Opinion was clear in stating that it was expressing no opinion on the merits of the respondents' preemption claim. Pet. App. 36a.

The inherently interlocutory nature of the September 17, 2008 Opinion is demonstrated by the following:

As noted above, the district court issued a preliminary injunction on August 18, 2008 prohibiting enforcement of AB 5's ten percent rate reduction for doctors, dentists, prescription drugs, adult day health care centers, and clinics, and on November 17, 2008, issued a similar preliminary injunction for home health agencies and non-emergency medical transportation providers in the Medi-Cal fee-for-service program. Petitioner's appeals from the preliminary injunctions were argued and initially submitted on February 18, 2009, to the same panel that authored the September 17, 2008 Opinion for which petitioner seeks *certiorari*.[5] The appeals are still pending.

It is because "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters," *American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148

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[5] On April 28, 2009, one of the members of the panel recused herself due to a change in circumstances and a new judge was appointed to the panel.

U.S. 372, 384 (1893), that *certiorari* of interlocutory decisions is strongly disfavored. If petitioner wins his pending Ninth Circuit appeals, for example, then petitioner will have prevailed without regard to anything ruled upon in the interlocutory September 17, 2008 Opinion.

And, further merits proceedings in this case following the pending appeals are unlikely because AB 5 has expired, and separate federal lawsuits have been filed to challenge the supervening state law (AB 1183) which set new reduced Medi-Cal provider rates effective March 1, 2009. *See* note 2, *supra*.

There is thus no point to expending judicial resources to review the interlocutory Opinion filed on September 17, 2008, from which Opinion petitioner seeks *certiorari*.

II. *CERTIORARI* SHOULD BE DENIED BECAUSE THERE IS NO DIVISION IN THE LOWER COURTS AND THE DECISION BELOW IS A CORRECT APPLICATION OF THIS COURT'S SUPREMACY CLAUSE JURISPRUDENCE

A. Petitioner's Claim That The Courts Of Appeals Are Divided Is Wrong Because The Courts Have Uniformly Reached The Same Conclusion As The Panel Below

There is no split in the circuits. To the contrary, every court of appeals is in accord with the Ninth Circuit's holding that a federal court may resolve, on

the merits, a claim that a plaintiff will be injured unless injunction or declaratory relief is issued to enjoin a preempted state law.

1. As petitioner documents in great detail (Pet. 22-28), and so this brief does not repeat, the First, Second, Fifth, Eighth, Tenth, D.C., and Federal Circuits have all reached the same conclusion as the Ninth Circuit did below.

In addition, the Third, Fourth, Sixth, and Seventh Circuits have all reached the same conclusion. *See St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000); *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 368-369 (4th Cir. 2004); *GTE North, Inc. v. Strand*, 209 F.3d 909, 916 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000); *Illinois v. General Elec. Co.*, 683 F.2d 206, 211 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

Thus, 12 of the 13 federal courts of appeals have unequivocally reached the same conclusion, all without dissent.

2. Petitioner asserts (Pet. 29-31) that the Eleventh Circuit has reached a different conclusion than its sister circuits in *Legal Environmental Assistance Foundation, Inc. v. Pegues*, 904 F.2d 640 (11th Cir. 1990). That assertion misapprehends *Pegues* and ignores a subsequent *en banc* decision that demonstrates that petitioner's view of the law has also been rejected by the Eleventh Circuit.

In *Pegues*, the alleged violation of federal law arose from the EPA Administrator's interpretation of federal law, which Alabama merely followed. The actual holding of *Pegues* was:

> Both [plaintiff] LEAF and the state agree that the proposed permits *comply* with the federal statute and regulations as they have been interpreted by the EPA. * * * LEAF's real dispute, therefore, is not with the state, but with the Administrator.

Id. at 644 (emphasis added).

The court noted that Congress had created an express cause of action against the federal agency, but the plaintiffs had not relied on that cause of action. The court therefore rejected the plaintiff's attempt "to bootstrap a statutory claim that should be asserted against the Administrator into a constitutional issue" of preemption. *Ibid.* Premised as it was on the conclusion that plaintiff was simply suing the wrong government, *Pegues* did not conflict with the decisions of the other 12 circuits.

The Eleventh Circuit's subsequent *en banc* decision in *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003), demonstrates that petitioner has misread *Pegues*. *BellSouth* involved a suit by a phone company against a state public service commission claiming that the commission's decision was contrary to federal law—there the Federal Telecommunications Act of 1996. The *en banc* court held that, apart from any

express cause of action available under the statute, "[f]ederal courts must resolve the question of whether a public service commission's order violates federal law and any other federal question as well as any related issue of state law under its pendent state jurisdiction." *Id.* at 1278 (citing *Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635 (2002)); *see also id.* at 1296 (Tjoflat, J., dissenting on other grounds) ("litigants may assert a private right of action for preemption under the Supremacy Clause").

Although the Eleventh Circuit has not yet had the opportunity to address expressly the effect of *BellSouth* on *Pegues* (and indeed, has never cited *Pegues* for any proposition related to preemption), *Pegues* does not support petitioner's call for this Court's review. Moreover, *Pegues* does not support petitioner's contention that preemption claims arising from Spending Clause statutes cannot be enforced, as the environmental statute in *Pegues* was not conditioned in the receipt of federal funds.

B. The Decision Below, Like The Decisions Of All The Other Courts Of Appeals, Followed Numerous Precedents Of This Court Permitting Preemption Claims To Enjoin State Law, Including In Cases Involving Spending Clause Statutes

1. This Court has long permitted private parties to obtain declaratory and injunctive relief to protect from injury threatened by state laws that are preempted by federal law. "This Court * * *

frequently has resolved pre-emption disputes in a similar jurisdictional posture," often reaching the merits. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

In *Shaw*, employers sought a declaration that a New York statute was preempted. The federal statute provided no cause of action against the State. Yet, the Court reached the merits of the employers' preemption claim. It explained:

> A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

463 U.S. at 96 n.14.

Subsequently, this Court unanimously reaffirmed the availability of injunctive relief on the basis of federal preemption. In *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), the Court again sustained the jurisdiction of the federal courts to hear claims that state conduct (there, an order of the public service commission) was preempted by federal law. In *Verizon*, the state commission argued that Verizon's preemption claim could not proceed, because the federal Telecommunications Act "does not create a private cause of action to challenge the Commission's

order." *Id.* at 642. The Court dismissed this argument, stating:

> We need express no opinion on the premise of this argument. "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case." As we have said, "the district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another, unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

Id. at 642-643 (citations and some quotation marks omitted).

As in *Shaw* and *Verizon*, respondents seek declaratory and injunctive relief against an allegedly preempted state law. Respondents' entitlement to relief will unquestionably depend on the construction of a federal statute. Petitioner does not argue that the claim is immaterial or wholly insubstantial and frivolous. The Ninth Circuit dutifully followed *Shaw* and *Verizon* in reversing the district court's dismissal of the preemption claim.

It is true that these cases speak in terms of jurisdiction, rather than in terms of a cause of action. But petitioner does not dispute the existence of a federal cause of action to enforce the Supremacy Clause. Indeed, petitioner himself conceded below that there were "circumstances under which a party may properly seek relief under the Supremacy Clause." C.A. Pet. Opening Br. 6. This sensible concession is in accord with the repeated and consistent actions of this Court in adjudicating preemption claims on the merits even in the absence of an express or implied statutory cause of action. It is also consistent with the understandings of leading federal courts treatises. *See* Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, *Hart & Wechsler's The Federal Courts & The Federal System* 903 (5th ed. 2003); 13D Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3566 (3d ed. 2008).[6]

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[6] The Second and Fifth Circuits have identified the Supremacy Clause itself as the basis of a cause of action for preemption claims, *see Burgio and Campofelice, Inc. v. NYS Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997); *Planned Parenthood of Houston & Southeast Texas v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005), while other courts of appeals (such as the Seventh Circuit in *Illinois v. General Electric Co.*, 683 F.2d 206, 211 (1982), *cert. denied*, 461 U.S. 913 (1983)), have rooted it in the federal All Writs Act and analogized it to the so-called "non-statutory review" that this Court has approved to ensure that federal officials comply with federal statutes. *See, e.g., American Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110-111 (1902); *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

2. Petitioner nonetheless argues that respondents' claim should be dismissed, because the federal statute at issue in this case, Medicaid, is a Spending Clause statute. Pet. Br. 12-13.

That assertion is contrary to this Court's recent practice. This Court has repeatedly adjudicated claims by private parties asserting preemption by virtue of the Medicaid statute and other federal spending statutes. In *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), a Medicaid recipient sought a declaratory judgment that a state law was preempted by the Medicaid Act, and this Court unanimously agreed. In *PhRMA v. Walsh*, 538 U.S. 644 (2003), drug makers also brought an action asserting preemption of a state law under the Act. A plurality of four Justices concluded on the merits that the state law was not preempted, while three Justices argued in dissent that the state law was indeed preempted.[7]

Furthermore, petitioner's claim appears to rely on the assumption that federal Spending Clause

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[7] Justice Thomas's concurrence suggested that the Court might want to consider "whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action." *Walsh*, 538 U.S. at 683 (Thomas, J., concurring in judgment). Justice Scalia concurred separately, proposing initial enforcement by the federal government. *Id.* at 675 (Scalia, J., concurring in judgment). Nevertheless, both Justices joined without reservation the Court's subsequent decision in *Ahlborn*, resolving a private action asserting preemption under Medicaid.

statutes cannot preempt state statutes under the Supremacy Clause. But that is contrary to a host of this Court's holdings. *See, e.g., Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) (per curiam) (preemption under Medicaid); *Blum v. Bacon*, 457 U.S. 132, 138 (1982); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993); *Lawrence County v. Lead-Deadwood Sch. Dist. 40-1,* 469 U.S. 256, 269-270 (1985); *see also Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.).[8]

Indeed, this Court has consistently held that the Eleventh Amendment is not a bar to private parties seeking prospective injunctive relief against state officials to enforce Medicaid and other Spending Clause statutes because such suits are necessary in order to vindicate the Supremacy Clause. *See Frew v. Hawkins,* 540 U.S. 431, 437 (2004) (Medicaid); *Edelman v. Jordan*, 415 U.S. 651 (1974) (welfare).

Preemption claims such as respondents' are consistent with the voluntary nature of States'

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[8] Every court of appeals to consider the argument that Medicaid as a whole is unenforceable (arising largely in the context of suits under Section 1983) because of its nature as Spending Clause legislation, has rejected that argument. *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1041 (8th Cir. 2002); *Antrican v. Odom*, 290 F.3d 178, 188 (4th Cir.), *cert. denied*, 537 U.S. 973 (2002); *Westside Mothers v. Haveman*, 289 F.3d 852, 860 (6th Cir. 2002), *cert. denied*, 537 U.S. 1045 (2002); *Frazar v. Gilbert*, 300 F.3d 530, 550 (5th Cir. 2002), *rev'd on other grounds, Frew v. Hawkins*, 540 U.S. 431 (2004).

participation in federal spending programs. Petitioner's assertion of a "sovereign right to choose not to comply," with such statutes, Pet. 32, is erroneous. States have a sovereign right to choose not to participate in federal programs and to choose not to take federal monies. But once they have made those choices, the State "must comply with [the federal statute's] mandates." *Winkelman v. Parma City School District*, 550 U.S. 516, 520 (2007).

C. There Is No Basis For Petitioner's Assertion That A Preemption Claim Must Satisfy The Standards Of 42 U.S.C. § 1983

Petitioner suggests that respondents' preemption claim should be dismissed because it does not meet the standards for a cause of action under 42 U.S.C. § 1983 ("Section 1983"). Pet. 15-16.

Section 1983 when enacted was a new, separate, and express special cause of action to enforce statutory and constitutional rights that provided various remedies against individuals acting under color of state law and municipal corporations.

Nothing in the legislative history or the decisions construing Section 1983 suggest—nor does petitioner point to any such history or suggestion—that the intent of Congress in enacting Section 1983 was to supplant or repeal all prior causes of action and remedies then available under the Constitution and the laws of the United States for injunctive or

declaratory relief to protect a person from injury from state action which is contrary to, and hence preempted under the Supremacy Clause by, a federal statute. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Thus, the federal remedies available for a proven violation of Section 1983 include compensatory and punitive damages against individuals in their individual capacities, compensatory damages against municipal corporations, and attorneys' fees against all individuals or municipal corporations (save for, in some circumstances, judicial officers). *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); 42 U.S.C. § 1988. Preemption claims, by contrast, seek only to enforce the structural relationship between federal and state law by obtaining prospective equitable relief against state and local officials in their official capacities.[9]

Several members of this Court have stressed that preemption cause of action and Section 1983 serve different purposes and have different requirements. In *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), for example, Justice Kennedy explained that even though he would have held that

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[9] *See Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1394 (9th Cir. 1987).

the plaintiff could not bring its action under Section 1983, that nevertheless:

> we would not leave the [plaintiff] without a remedy. Despite what one might think from the increase of litigation under the statute in recent years, *§ 1983 does not provide the exclusive relief* that the federal courts have to offer. * * * [P]laintiffs may vindicate [statutory] preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes. See 28 U.S.C. § 1331 (1982 ed.); 28 U.S.C. § 2201; 28 U.S.C. § 2202 (1982 ed.). These statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983.

Id. at 119 (Kennedy, J., dissenting) (some citations omitted, emphasis added).

Thus, it is not surprising, as the Ninth Circuit observed, that this Court "has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met." Pet. App. 11a (citing, *inter alia*, *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)); *see also Hagans v.*

Lavine, 415 U.S. 528, 553 (1974) (Rehnquist, J., dissenting) (a claim that state welfare regulations conflict with federal regulations would properly invoke federal question jurisdiction to determine whether the state regulations are "invalid under the Supremacy Clause of the United States Constitution").

Indeed petitioner, in contending, on the basis of no supporting precedent, the novel view that the rules applicable to whether a person injured by preempted state action may obtain injunctive relief are solely those rules applicable to Section 1983, ignores statements in *Golden State Transit* in which the Court has specifically recognized that there is life before and after Section 1983; *i.e.*, that whether or not a cause of action for injunctive relief against preempted state action exists does not depend exclusively or at all upon whether there is a cause of action therefore under Section 1983.

> Given the *variety of situations* in which preemption claims may be asserted, in state court and in federal court, it would be obviously incorrect to assume that a federal right of action *pursuant to § 1983* exists every time a federal rule of law pre-empts a state regulatory authority.

493 U.S. at 107-108 (emphasis added).

There are thus more causes of action in the federal statutory and constitutional universe for injunctive relief against preempted state action, than

are dreamt of or included within the provisions of Section 1983.

Petitioner also asserts (Pet. 19) that continued judicial recognition of a cause of action such as the preemption cause of action found to exist in the case at bar by the September 17, 2008 Opinion of the Ninth Circuit—the elements of which are different from the elements of a cause of action which may arise under Section 1983—might have the effect to by-pass the relevant federal administrative agency.[10] But this argument has long been resolved against petitioner. In the seminal case of *Rosado v. Wyman,* 397 U.S. 397 (1970), the Court held that it had "considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements." *Id.* at 420. The Court explained that it was "most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." *Ibid.*

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[10] This argument is particularly ironic in that petitioner did not submit his proposed plan amendment to the federal government reflecting the rate cuts until September 30, 2008 (Pet. App. 76a), even though the state law imposing the rate cuts went into effect on July 1, 2008 (for those not protected by the preliminary injunctions subsequently issued in this litigation).

As in *Rosado*, there is no evidence in the text or structure of the Medicaid Act that Congress intended to close this existing avenue of judicial review to respondents. *Cf. Blessing v. Freestone*, 520 U.S. 329, 346-348 (1997) (citing with approval holding in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 521 (1990), that the federal government's "power to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law * * * accompanied by limited state grievance procedures for individuals" was insufficient to preclude reliance on an existing private cause of action).[11] Further, to the extent that a private lawsuit should raise novel questions about the interpretation or application of a federal law, a federal court may invite the pertinent agency to participate as *amicus curiae* or otherwise in the court proceedings. *See Rosado*, 397 U.S. at 406-407.

Petitioner also fears that judicial recognition of preemption causes of action, outside the purview of Section 1983, will unduly interfere with state programs. Pet. 19. But this case was not the first time the Ninth Circuit has recognized this cause of action. To the contrary, it expressly reached the same conclusion long ago, as did many other courts of

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[11] Although petitioner asserts (Pet. 18, 32) that Congress amended Medicaid to withdraw certain substantive requirements related to setting rates, the argument has so little flesh on its bones as to be no argument at all, and was, as noted above, not reached by the court of appeals in this case.

appeals. As petitioner himself acknowledged below, the Ninth Circuit "has recognized that 'the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.'" C.A. Pet. Opening Br. 5-6 (quoting *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 512 (9th Cir. 1990)); *see also Bernhardt v. Los Angeles County*, 339 F.3d 920, 929 (9th Cir. 2003); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994). Yet petitioner has pointed to no untoward results that have occurred over this 20-year period and there have been none.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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REPLY BRIEF

Supreme Court, U.S
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No. 08-1223

In the Supreme Court of the United States

DAVID MAXWELL-JOLLY, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA,

Petitioner,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, A NONPROFIT CORPORATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

The Ninth Circuit held that Medicaid providers and beneficiaries can sue under the Supremacy Clause to enforce 42 U.S.C. § 1396a(a)(30)(A) even though the statute concededly does not create a private right of action; does not create any rights privately enforceable under 42 U.S.C. § 1983; and instead authorizes a federal agency to oversee states' compliance. The decision conflicts with – indeed, provides an end run around – several lines of this Court's precedents. *See, e.g., Cort v. Ash*, 422 U.S. 66 (1975); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). The decision also deepens a pre-existing circuit split with the Eleventh Circuit. *See Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640 (11th Cir. 1990).

The question presented is both important, implicating core principles of federalism, and recurring. Indeed, in just the two months since the Petition in this case was finalized for printing, courts in three other states (Arizona, Idaho, and Washington) have relied upon the Ninth Circuit's decision to permit private challenges to reductions in Medicaid payments and services to proceed, and one state (Washington) has abandoned efforts at Medicaid payment reform as a result. For these reasons and those that follow, the Petition should be granted.

I. The Ninth Circuit's Decision Undermines This Court's Precedent

The expansive theory of state liability adopted by the Ninth Circuit cannot be reconciled with the limitations on implied private suits against the states applied by this Court in *Cort*, *Pennhurst*, and *Gonzaga*, among numerous others. Perhaps most important among those limitations: no cause of action may be implied or otherwise recognized absent evidence that Congress intended to create a privately enforceable "right." *See Gonzaga*, 536 U.S. at 283; *Cort*, 422 U.S. at 78. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

Respondents do not dispute that their lawsuit runs afoul of the traditional limitations on implied causes of action. Thus, they do not argue that Congress intended to allow private enforcement of § 1396a(a)(30)(A) under *Cort v. Ash*. They do not discuss, let alone harmonize, their theory with this Court's repeated statement that, as to preemption claims, Congressional intent must be the "ultimate touchstone," *see, e.g., Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187, 1194 (2009), a serious problem with their case given the Ninth Circuit's refusal to analyze Congressional intent, the affirmative evidence of contrary intent, and the lack of evidence of positive intent. *See Pennsylvania Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 540 n.15 (3d Cir. 2002); H.R. Rep. No. 105-149, at 590 (1997). They also do not dispute

that 42 U.S.C. § 1396a(a)(30)(A) is ill-suited to judicial enforcement because it sets conflicting policy goals rather than imposing a clear mandate, and therefore does not create any rights privately enforceable under § 1983. *See Sanchez v. Johnson*, 416 F.3d 1051, 1060 (9th Cir. 2005); *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004).

Finally, respondents do not dispute the extraordinary breadth of their theory of liability. Under respondents' theory, a private preemption claim may be asserted as to any federal statute based on a purported conflict between that statute and a state statute or policy. But this theory directly conflicts with this Court's holding that Congress "must" create any private claims premised on federal statute*s*. *Sandoval*, 532 U.S. at 286. Such a requirement means nothing if a private preemption claim *always* may be asserted.

Instead, respondents cite a slew of cases for the proposition that the type of claim they seek to raise is supported by precedent. But, as described below, those cases cannot be considered precedential as to an issue that they did not reach. Tellingly, respondents do not cite a single case in which this Court allowed a preemption claim to proceed based on a federal Spending Clause statute that had previously been held not to confer privately enforceable rights – the situation here – because no such precedent exists.

Thus, respondents rely on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) and *Verizon Maryland,*

Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002), as well as a string of other cases cited by the Ninth Circuit. Opp. at 16, 24. Respondents must eventually concede, however, that these cases merely addressed the jurisdictional basis for preemption claims, Opp. at 19, and did not reach the question presented here. As such, they are not authority: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).[1] Further, *Shaw*, on which respondents rely most heavily, involved a federal statute (ERISA) with an express preemption provision, an unambiguous statement of Congressional intent and therefore a significant point of distinction. *See* 463 U.S. at 91-92 (applying 29 U.S.C. § 1144).

Respondents cite *Green v. Mansour*, 474 U.S. 64, 68 (1985), for the proposition that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." Opp. at 23. But it has never been the case that every federal law carries a private remedy. *See Livadas v. Bradshaw*,

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[1] Respondents' citation to preemption cases involving Spending Clause legislation suffers from the same defect. *See* Opp. at 20-21 (citing, *inter alia, Arkansas Dep't of Health & Hum. Servs. v. Ahlborn*, 547 U.S. 268 (2006)). Because the states did not challenge the private enforceability of the federal statutes at issue in the cited cases, they cannot be considered precedential. *Webster*, 266 U.S. at 511.

512 U.S. 107, 133 (1994). Any federal interests are adequately protected and advanced by the approaches adopted in *Cort*, *Pennhurst*, and *Gonzaga*, which operate to ensure the supremacy of the law consistent with Congressional intent.

Finally, respondents build a number of straw men. Petitioner does not contend that private suits are precluded whenever a federal statute provides for federal agency review. Opp. at 26-27 (citing *Rosado v. Wyman*, 397 U.S. 397 (1970)). To the contrary, petitioner recognizes that this Court has long held that, where Congress has expressly intended to create a privately enforceable right, the mere existence of an administrative review scheme will not generally preclude private lawsuits. *See, e.g., Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 522 (1990). But, where there is no evidence that Congress intended for private enforcement, and where the federal statute at issue does not lend itself to judicial enforcement, agency review may be not only the most appropriate, but also the exclusive, means of review – subject, of course, to later judicial review of that agency's decision. *See* Pet. at 16-19; *see also Pharm. Res. & Mfrs. of Am. (PhRMA) v. Walsh*, 538 U.S. 644, 672-73, 675, 675-83 (2003) (Breyer, J., Scalia, J., Thomas, J., separately concurring or concurring in judgment). And, contrary to respondents' assertions, petitioner does not contend that the requirements of § 1983, per se, must be imported into the Supremacy Clause context, Opp. at 22, but rather that the traditional limits on implying private claims from federal statutes apply

no less in the preemption context than they do elsewhere. Pet. at 13-21.[2]

II. The Ninth Circuit, Together With Several Other Circuits, Has Misapplied This Court's Precedent and Deepened an Existing Split With the Eleventh Circuit

The need for this Court's review is compelling because several circuits (including the D.C., First, Fifth, and Eighth Circuits) have recently embraced the expansive theory applied by the Ninth Circuit. In so doing, these circuits have largely misconstrued this Court's willingness to reach the merits of petitioner's Medicaid preemption claim in *Walsh* as carrying an implicit holding that petitioner had stated a valid cause of action under the Supremacy Clause. *See* Pet. at 21-28 (citing, *inter alia, Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005); *PhRMA v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004)). These cases, together with others cited in the Petition, have deepened an existing split with the Eleventh Circuit. *See Pegues*, 904 F.2d at 643-44.

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[2] Contrary to respondents' suggestion otherwise, petitioner affirmatively disputes that the Supremacy Clause may, of its own force, create a private cause of action. Pet. at 19-20 (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979); *Dennis v. Higgins*, 498 U.S. 439, 450 (1991)).

Respondents do not dispute that the Ninth Circuit erred in relying on *Walsh*, an opinion (like *Shaw*) that did not actually address whether there was a private cause of action. *See* Pet. at 24-28, 32-34 (citing, *inter alia, Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*). Accordingly, a main contention in the Petition is unchallenged: that the recent circuit decisions allowing preemption claims to proceed in the absence of a privately enforceable right rest in significant part upon an error of law that only this Court has the power to correct.

Respondents do, however, dispute the existence of a circuit split, contending that the Eleventh Circuit's decision in *Pegues* is consistent, not at odds, with those of other circuits. Opp. at 14-15. Specifically, they contend that *Pegues* was premised on the conclusion that "plaintiff was simply suing the wrong government." Opp. at 15. Respondents' interpretation is insupportably reductionist. *Pegues* expressly refused to permit plaintiffs to imply a cause of action "directly from the Supremacy Clause" where, as here, Congress did not create a federal right privately enforceable under § 1983. 904 F.2d at 643 (citing *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981)). As such, it is on point and conflicts irreconcilably with the Ninth Circuit's decision here, as well as decisions from the other circuits.

Respondents contend that the en banc decision in *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270

(11th Cir. 2003), "demonstrates that petitioner has misread *Pegues*." Opp. at 15. However, neither the *BellSouth* majority nor the dissent mentioned *Pegues*, let alone attempted to clarify or overrule it. In *BellSouth*, the question presented was purely jurisdictional: applying *Verizon*, the court held that the district court had jurisdiction, under 28 U.S.C. § 1331, over a challenge to an order issued by a state public service commission. 317 F.3d at 1278-79. The court did not purport to address the issue resolved in *Pegues*, of whether a plaintiff may state a claim under the Supremacy Clause in circumstances analogous to those present here. Nor does the *BellSouth* dissenting opinion, cited by respondents, supply a basis for ignoring the plain meaning of *Pegues*. *See id.* at 1296 (Tjoflat, J., dissenting) (dissenting on the ground that the district court did not have jurisdiction pursuant to 28 U.S.C. § 1331 over claims on appeal, but stating that "abandoned" claim "could have been asserted" either as a § 1983 claim or as a preemption claim under *Shaw*).

III. The Ninth Circuit's Decision Is an Appropriate Vehicle for Reviewing the Question Presented

Respondents contend that the Petition should be denied because the Ninth Circuit's decision is interlocutory, and thus that its importance may be mooted by subsequent events in the case or statutory enactments. Opp. at 11. Beyond dispute, this Court has jurisdiction to grant the Petition, and respondents do

not argue otherwise. 28 U.S.C. § 1254; *see also Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923) ("Our power to grant writs of certiorari extends to interlocutory as well as final decrees. . . .").

The Court should grant the Petition because the issue presented is important and because the Ninth Circuit's decision already has established vitality far beyond the geographic and temporal limits of the present suit.[3] The Ninth Circuit's decision is not an outlier decision as to a nonrecurring issue, but rather the latest in a string of recent circuit court decisions to misread this Court's decision in *Walsh*. Pet. at 21-31. Relying expressly on the Ninth Circuit's decision,

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[3] The case is not moot. After the Ninth Circuit's order on July 11, 2008, the district court enjoined some of the reductions mandated by AB 5. *See Independent Living Ctr. of S. Cal. v. Shewry*, No. CV 08-3315 CAS, 2008 WL 3891211 (C.D. Cal. Aug. 18, 2008). Petitioner's appeal of the district court's order is pending in the Ninth Circuit. As respondents note, a subsequent enactment (AB 1183) amended California Welfare and Institutions Code § 14105.19 to sunset the reductions on February 28, 2009, and enacted a new set of smaller reductions to take their place, *see id.* § 14105.191. While that makes respondents' claim for injunctive relief moot, the appeal presents a live controversy because the injunction forced the state to pay providers hundreds of millions of dollars more in Medi-Cal reimbursements than the state would have had to pay had AB 5 remained in full force. The Ninth Circuit's decision regarding the preliminary injunction will determine whether the state is entitled to recoup those extra payments. And a decision by this Court that respondents lacked a private cause of action would likewise mean that AB 5 was improperly enjoined, thereby entitling the state to recoup those monies the state was wrongly forced to pay.

courts in at least three other states – Arizona, Idaho, and Washington – have recently enjoined Medicaid reductions. *Affiliates, Inc. v. Armstrong*, No. CV-09-149-BLW, 2009 WL 1197341, at *4 (D. Idaho Apr. 30, 2009) (entering temporary restraining order and holding that plaintiffs had asserted a claim that is "actionable under the Supremacy Clause" even though § 1396a(a)(30)(A) does not confer a "substantive" right on providers); *Washington State Pharmacy Ass'n v. Gregoire*, No. C09 5174-BHS, 2009 WL 1259632 (W.D. Wash. Mar. 31, 2009) (temporarily restraining implementation of a six percent reduction in Medicaid reimbursement rates as preempted under § 1396a(a)(30)(A)); *Arizona Ass'n of Providers for Persons with Disabilities v. State*, No. 1 CA-CV 09-0167, 2009 WL 1156492, at *10 n.9. (Ariz. Ct. App. Apr. 30, 2009) (vacating a trial court injunction after holding, based on the Ninth Circuit's decision, that "[t]here is a private cause of action under the Supremacy Clause of the United States Constitution for a violation of Title XIX's network requirements"). As a direct result of such litigation, the State of Washington abandoned any effort to implement its Medicaid rate adjustments.[4]

Courts in California also have extended the Ninth Circuit's decision, applying it to claims brought

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[4] *See* Letter from Doug Porter, Assistant Secretary, Washington Medicaid Pharmacy Program, Health and Recovery Services Administration, to "Pharmacies" (Apr. 17, 2009), *available at* http://fortress.wa.gov/dshs/maa/pharmacy/Broadcast%20fax%2004%2020%2009%20includes%20memo%2009%2016.doc.

by other types of providers and claims involving different enactments. *See, e.g., California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009) (granting motion to stay AB 1183, which would have reduced Medi-Cal reimbursement rates for certain services effective March 1, 2009, as to hospitals); *Managed Pharmacy Care v. Maxwell-Jolly*, 603 F. Supp. 2d 1230 (C.D. Cal. 2009) (enjoining AB 1183 in suit brought by pharmacists); *see also Mission Hosp. Reg'l Med. Ctr. v. Shewry*, 85 Cal. Rptr. 3d 639, 651 n.6 (Cal. Ct. App. 2008) (citing Ninth Circuit's decision in dicta for the proposition that challenges to Medicaid rates under § 1396a(a)(30)(A) could have been brought under the Supremacy Clause).

Respondents imply, incorrectly, that petitioner should have filed a certiorari petition with respect to an earlier, July 11, 2008 order, which they contend represented the Ninth Circuit's judgment. They are wrong: the September 17, 2008 order, rather than the earlier July order, represented the court's judgment. The July order expressly contemplated issuance of an "opinion, in due course," Order, 9th Cir. Dkt. 16 at 3, n.1; *see also id.* at 5 ("An Opinion will follow."), and the Ninth Circuit did not give notice of entry of a judgment at that time as would be required. Fed. R. App. P. 36(b). Although a mandate issued on July 16, 2008, 9th Cir. Dkt. 20, the Ninth Circuit recalled the mandate on September 17, 2008, 9th Cir. Dkt. 41, and filed the opinion now at issue. 9th Cir. Dkt. 42; Pet. App. at 1a, 36a. This time, the Ninth Circuit did give notice of entry of judgment, which it appended

directly to the opinion. 9th Cir. Dkt. 42 ("This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36."). The Ninth Circuit's mandate, which issued on February 2, 2009, expressly referred to the September 17, 2008 opinion as the "judgment of this Court." 9th Cir. Dkt. 60; *see also* 9th Cir. Dkt. 55 & 58 (same).[5]

IV. The Issue Presented Is Important and Recurring

The issue presented here is both important, as it strikes at core principles of federalism, and recurring, as confirmed by the authorities and developments described in Parts II and III. Respondents contend, nonetheless, that the rule applied by the Ninth Circuit will lead to no "untoward results." Opp. at 28. As applied in this case, the "untoward result" is unmistakable: the court's opinion resuscitated a type of claim that previously was precluded, *Sanchez*, 416 F.3d at 1062, despite Congressional intent to eliminate such claims. That the same analysis adopted by the Ninth Circuit here may be applied to authorize lawsuits premised on virtually any Spending Clause statute, no matter how "vague and amorphous" and "ill-suited" to judicial review and without regard to Congressional intent, makes the result more than

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[5] Following a phone conversation with the Clerk's office on March 18, 2009, petitioner omitted all but the September 17, 2009 decision from the appendix as unnecessary to the Court's understanding of the case. S. Ct. Rule 14.1(i).

"untoward," but potentially devastating to the states and our system of federalism.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: June 1, 2009

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